



REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
2862 F
OF
THE STATE OF MISSOURI.

SAMUEL A. BENNETT,
REPORTER.

VOL. XX.

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JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. HAMILTON R. GAMBLE,

HON. WILLIAM SCOTT,

HON. JOHN F. RYLAND,

HON. ABIEL LEONARD.

The resignation of the Hon. HAMILTON R. GAMBLE of his office as Judge of the Supreme Court took effect on the 15th of November, 1854. On the 1st of January, 1855, ABIEL LEONARD, of Howard county, was elected by the people to fill the vacancy, and on the 31st of the same month, he qualified and took his seat upon the bench, near the close of the January term, at Jefferson City.

THE STATE OF NEW YORK

IN SENATE

January 12, 1892

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 12, 1892

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CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

OCTOBER TERM, 1854, AT ST. LOUIS.

PENN'S ADMINISTRATOR, Defendant in Error, *vs.* WATSON,
Plaintiff in Error.*

1. Where there are mutual running accounts, and the last item on either side is not barred by the statute of limitations, the whole account is saved from the operation of the statute.
2. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, were held inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale.
3. Under the new practice act, the distributee of a solvent estate is not a competent witness for the estate.
4. The provision in the administration law of 1845, that an administrator shall not be an incompetent witness for the estate, as to facts which occurred before his qualification, does not apply when he is at the same time a distributee.

Error to St. Louis Circuit Court.

This was an action brought in April, 1851, by W. P. Penn, administrator of Shad. Penn, deceased, to recover a balance due the intestate on a running account, the particulars of

* This case was decided at the March term, 1852, and so far as relates to the incompetency of a distributee as a witness for a solvent estate, is overruled by the next succeeding case, which was decided at the March term, 1853.

Penn's Adm'r v. Watson.

which appear in the opinion of the court. The defendant relied upon the statute of limitations, and also filed an off-set, the particulars of which appear in the opinion. At the trial, the plaintiff offered himself as a witness. On his *voir dire*, he stated that he was a son and one of the heirs of the intestate, and that he believed the estate to be solvent. The court permitted him to testify, to which the defendant excepted. To establish his off-set, the defendant offered his own books of account in evidence, first proving that they had been kept by his sons, who had removed to California. A witness, who had been in the habit of dealing with defendant, testified to his belief that the books had been correctly kept. The plaintiff offered, with the books, his own suppletory oath. The court refused to permit the books to be read in evidence, to which the defendant excepted. After judgment for plaintiff, defendant appealed.

A. P. & P. B. Garesché, for plaintiff in error. 1. W. P. Penn, being a distributee of the estate, which is solvent, is a party for whose *immediate benefit* the suit is prosecuted, and an incompetent witness under the code. 2. The defendant's books of original entry, having been shown to have been kept by a person other than himself, were admissible in his favor. (1 Greenl. Ev. §117. 1 Phill. Ev. ch. 7, §7.) 3. The statute of limitations was a good defence to those items in plaintiff's account, which accrued more than five years before the commencement of the suit. If this suit had been founded on an open account for goods sold, or a store account, it would have been barred after the lapse of two years. Not being such an account, the doctrine of mutual credits does not apply, unless there are items *on both sides* within the period of limitation. (2 Greenl. Ev. part 4, §445.)

No brief filed for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff, Worden P. Penn, as administrator of S. Penn, jr., deceased, against Ringrose

Penn's Adm'r v. Watson.

D. Watson, on an account for advertising and for subscription to the Missouri Reporter, extending from January, 1844, up to July 27th, 1846, for the sum of \$62 41, on which account are credits for sundries, at different times, during the periods aforesaid, \$21 75; products, per orders of W. P. Penn, during August, 1849, \$12 10, making credits amount to \$33 85, leaving a balance of \$28 56 due the estate.

The defendant relies upon the statute of limitations, and called, by his answer, upon the court to allow him the benefit of that statute, and also his set-off against the account. This set-off consists of two orders from the plaintiff, as administrator of the estate of S. Penn, jr., deceased; one is, "for five dollars' worth of fruit, vegetables, and other articles, which shall be credited upon your account, due the estate of Shadrach Penn, Jr., deceased." This order is dated August 16, 1849. The other is dated August 27, 1849, and requests the defendant "to let the bearer have such articles as he may choose, amounting to five or eight dollars, for which he will receipt, and the amount shall be credited on your account due the estate of Shadrach Penn, jr., deceased;"—and an account from March, 1844, up to February 26, 1845, for queensware, &c., amounting to \$44 01.

The court refused to declare that the plaintiff's account was barred by the statute of limitations. The court also refused to permit the books of account of the defendant to be read in evidence as proof of the items in the account of the set-off.

Upon the trial, the plaintiff was introduced as a witness, to prove some of the items in the account against the defendant. He was first sworn on his *voir dire*, and stated he was a son of the deceased, Shadrach Penn, jr., and that the estate was solvent. The defendant then objected to him as a witness; his objection was overruled and exceptions taken. The jury found for plaintiff; a motion was made for a new trial, overruled and exceptions filed. The defendant brings the case here by writ of error.

1. The court properly refused to declare that the statute of

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limitations barred the plaintiff's right of action. Here were mutual accounts, some of the items coming down to the period within the limitation. There was a set-off, expressly admitting that the first two items thereof were to be credited on the account of the estate against the defendant; these items bringing down his account within the period of the limitations. The statute, then, was properly declared to have nothing to do with the case.

2. The court also properly excluded the books of account of the defendant. He had made no case for their admission. The authorities cited by the counsel for the defendant, do not support his view of this matter. The clerks of the defendant were absent in a sister state. No proof was offered by him to show that the items of the account were charged at the time of the sale, or near to the time. See 1 Greenl. Ev. sec. 117, part 2.

3. The only remaining point is the admissibility of the plaintiff as a witness to support his action. On this point, we think the court erred. The 25th article of the code of practice of 1849, sec. 1, declares that "no person offered as a witness, shall be excluded by reason of his interest in the event of the action." Sec. 2. "The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness."

The witness here was the plaintiff, "a party to the suit." He was called to prove the amount due to the estate of his deceased father, which was solvent, and, consequently, was called to increase the fund from which he was in law to receive his distributive share. He was expressly within the first clause of the second section above cited; he was "party to the action." He was also within the second clause. The suit was prosecuted for his benefit, as well as for the benefit of others. Under this statute, then, he was clearly incompetent.

4. The statute concerning administration, article 2, section 24, p. 76, R. C. 1845, declares that, "In all actions prose-

Stein v. Weidman's Adm'r.

cuted or defended by or against any executor or administrator, he shall not be disqualified from being a witness, as to facts occurring anterior to his qualification, on account of his being such executor or administrator — that is, the bare official character of administrator or executor shall not disqualify him as a witness to such facts, although he be a party to the suit; but when interest attaches to the administrator or executor, he is not competent to be a witness. His office of executor or administrator does not disqualify him as a witness; but this office will not qualify him by rendering him competent, when he is interested in the suit.

The court, therefore, erred in admitting the plaintiff to testify for himself in this case, on his own motion. The other judges concurring, the judgment below is reversed, and the cause remanded for further proceedings, in accordance with this opinion.

STEIN, Defendant in Error, *vs.* WEIDMAN'S ADMINISTRATOR,
Plaintiff in Error.*

1. The distributee of a solvent estate is a competent witness for the estate, under the new practice. (*Penn v. Watson*, ante, overruled.)
2. A widow is a competent witness for or against her deceased husband's estate, as to facts which she did not learn from her husband.
3. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted.

Error to St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

C. Gibson, for plaintiff in error. A distributee of an estate is not a party to the action, nor a person for whose *immediate* benefit it is defended, within the meaning of the new practice

* This and the three next following cases were decided at the March term, 1853.

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act. While the administration is open, the administrator acts for the creditors, as well as the distributees. If a distributee is incompetent, so is a creditor. The competency of the witness cannot be made to depend upon the solvency or insolvency of the estate; for it may be impossible, when the witness is offered, to know whether the estate will prove solvent or insolvent. Under the law, as it stood before the new act, a distributee was incompetent, on the ground of *interest*, and not of being a party for whose immediate benefit the suit was prosecuted or defended.

C. C. Whittelsey, for defendant in error. 1. The widow of the intestate, whose estate is solvent, is not a competent witness for the administrator. The new code only abolishes disqualification arising from *interest*, and still leaves a party for whose benefit a suit is prosecuted or defended disqualified. By our statute, the widow takes one third of the personal estate absolutely, subject to the payment of debts. The widow and next of kin really own the estate, and the administrator is a mere trustee. (New code, art. 25, §1 and 2. *Bank of Ithica v. Dean*, 1 N. Y. Code Rep. 133. *Hoffman v. Stevens*, 2 N. Y. Code Rep. 16. 3 Code R. 24.) 2. She should also be excluded as the widow, for, as she still remains protected from divulging the secrets of her deceased husband, she should not be allowed to testify for the estate. (1 Greenl. Ev. §337.)

RYLAND, Judge, delivered the opinion of the court.

The only question in this case is in relation to the admissibility of the witness, Elizabeth Schell, the wife of the defendant, and former widow of Weidman, the intestate. Schell, the administrator of the estate of Adam Weidman, is sued by Stein for work and labor done by Stein for said Weidman; or, rather, Stein exhibited his demand against the estate of Weidman, for allowance in the Probate Court, for \$788, on which was a credit of \$500.

Stein v. Weidman's Adm'r.

This demand was disallowed, all except the sum of \$88, which last sum was allowed in favor of Stein, against the estate of Weidman. From this judgment, Stein appealed to the Circuit Court, and there obtained judgment for the sum of \$325 44.

On the trial of the appeal in the Circuit Court, the administrator, Schell, offered the widow of said Weidman, deceased, who was then his own wife, as a witness, to prove an agreement between said plaintiff, Stein, and said Weidman, about this demand. The plaintiff objected to the witness as incompetent. The court sustained the objection, and excluded the witness. The administrator, defendant, prayed for a review and for a new trial. His motion being overruled, he sues out his writ of error.

The estate of Weidman was admitted to be solvent. In the case of *Scroggin & Smith v. Holland*, decided heretofore by this court, (16 Mo. R.) the question of the competency of the widow, as a witness, for the benefit of the estate of her deceased husband, was before the court, and it was there held, that she was competent. In that case, the estate was insolvent, and it was admitted that she had received all she was entitled to. In the present case, the estate is solvent. This does not alter the question in relation to the competency of the witness.

The objections to the competency of this witness rest upon the ground that she is a distributee, is entitled to a share in the estate of her deceased husband, and that, therefore, the suit is defended for her immediate benefit; and so she cannot be a witness under the new code; and that the policy of the law will not suffer the widow to testify in behalf of the estate of her deceased husband. These objections are fully within the principles of the case of *Scroggin & Smith v. Holland*, and have been overturned by the decision therein.

In addition to what is said in that opinion, it may not be amiss to cite some authorities, settling this question, and putting it at rest for the future. In *Babcock v. Booth*, 2 Hill's Rep. 181, it was held, that the widow was a competent witness

to testify against the administrator of her deceased husband, in respect to any facts which she did not learn from her husband.

In the case of *Weston v. Hatch, Ex'r*, in an action against an executor for work and labor and services done for the decedent, a residuary legatee, under the will, was held a competent witness for the executor. (6 Howard's Prac. Rep. 443.) In this case, the court, by Hubbard, Justice, delivered the opinion, in which it is stated that, "prior to the code, the incompetency of a residuary legatee, in behalf of personal representatives, was undisputed. He had a direct interest to sustain or defeat a recovery, because affecting the residuum of the estate in which he was a participant. But we think the referee erred in applying the former rigid common law rule to a case like the present, under the code; or in holding, that a residuary legatee, of a solvent estate, was immediately interested, and therefore incompetent as a witness. Under the code, no interest disqualifies except as applied to a party to the suit, or to a person for whose *immediate* benefit the action is prosecuted or defended. When not a party, the latter exception applies to a person standing in close legal relationship to the party to the action, and for whom the party would hold the fruits of the judgment, as trustee; for instance, the *cestui que trust* or ward, when the trustee or guardian prosecutes or defends. It was the intent of the legislature to change, radically, the law of evidence, as to the competency of witnesses; to discard the common law test of pecuniary interest in the event of the suit, and to exclude only parties to the record and those who are *quasi* parties, by reason of an immediate beneficial interest. This is obvious, from the use of the term "immediate benefit," as distinguished from a resulting or collateral interest in the event." Our code and the New York code are similar in regard to the competency of witnesses.

In the opinion of this court, the widow of a decedent may be a witness for or against the administrator or executor of the estate of her deceased husband, whether solvent or insolvent,

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as to all such facts as the policy of the law does not require to be kept sacred and secret between husband and wife, during marriage. See, again, *Babcock v. Booth*, 2 Hill, 181. This disposes of the questions in the case discussed by the counsel, in their briefs, and the court might stop here, reversing and remanding the case; but we see upon the record another question which, though passed by in silence by the counsel of the parties, we will still decide and settle.

The new code does not change the relation of husband and wife from what it was at common law, as regards the competency of either to testify for or against each other. (*Pillow v. Bushnell*, 2 Code Rep. 19. *Erwin v. Smaller*, 2 Sandf. Sup. Court Rep. 340.) "A wife cannot be compelled to appear and be examined as a witness in a suit against her husband. The code of procedure, allowing a party to call the adverse party as a witness, has not affected this principle, which proceeds not on the ground of interest in the suit, but on the ground of its leading to the interruption of domestic harmony and confidence." In this last case, the court remarked, "the objection does not arise from interest in the event of the suit, but from the interruption which the allowance of such a practice would produce in the domestic harmony of the parties, and in that confidence which ought to exist in the marriage relation." See *Burrell v. Bull*, 3 Sandf. Chan. Rep. 19. "A husband cannot be a witness in favor of his wife or of her trustee in a suit respecting her separate estate, although he has no interest in the subject matter."

In the case before us, the record shows that Elizabeth Schell, the widow of Adam Weidman, now the wife of the defendant, was offered and refused as a witness.

This was a proceeding to have an allowance made against the estate of Weidman. True, it was defended by the administrator; he manages the defence for the estate; by our statute, the administrator is himself a competent witness in suits against him as such, as to facts that came to his knowledge previously to his administering on the estate. In this case,

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then, Schell might have lawfully testified as to facts which he knew, in regard to this demand, before he became the administrator, and the same may be said as to his wife, Elizabeth Schell. There is no objection, then, in regard to this witness being a distributee, or the widow of Weidman, or the wife of Schell, the administrator, which reaches to her competency.

The estate is solvent; the administrator is not liable for costs *de bonis propriis*, in this case; the wife is not a party, nor a *quasi* party, for whose immediate benefit the suit is defended; and nothing in the policy of the law against her testifying for the administrator of her deceased husband's estate.

This case overturns the opinion of *Penn v. Watson*, delivered in May, 1852, so far as regards the interest of a distributee in a solvent estate, rendering such distributee incompetent. Such was the undisputed rule of evidence at the common law. Our statute, overturning this rule, was of such recent date, that it is not to be wondered at, if the judicial mind, fully impressed with the well known rules of evidence at common law, should apply those rules, instead of the new. But when we come to reflect upon, and to administer the law, under our new code, more maturely, we hesitate not to retrace our errors as speedily as we are convinced of them. All new systems require time before the judicial determinations can reasonably be expected to become, in every particular, correct and stable.

The judgment below is reversed, and the cause remanded, the other judges concurring.

REED, Respondent, vs. CONWAY, Appellant.

1. Where ministerial officers are required to exercise their judgment, they are not liable for any errors, in the absence of malice. So, a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment.

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Appeal from St. Louis Circuit Court.

This was an action on the case, commenced in 1846, by Warren Reed against Frederick R. Conway, then surveyor general of Illinois and Missouri. The declaration contained four counts.

The first count averred that, on the tenth day of May, 1845, Silas Reed, then surveyor general of Illinois and Missouri, entered into certain articles of agreement, under seal, with the plaintiff, by which it was witnessed and agreed that the plaintiff would, under his own personal and immediate superintendence, and not by sub-contract, execute certain surveying in the state of Missouri, agreeably to the laws of the United States and such instructions as might be given him by said Silas Reed, viz: that he would survey or subdivide into sections, and establish proper corners thereto, townships 65, 66 and 67 north, in ranges 39 and 40 west, and meander the navigable water courses therein, if any, all being north of the base line, and west of the fifth principal meridian; and that the plaintiff would complete the aforesaid surveys and make return to the office of the surveyor general of his original field notes, together with a fair and correct copy thereof, and a separate plat of each of the townships subdivided, within six months from July 1, 1845; and it was further agreed in and by said articles that, on completion of the work, there should be paid to the plaintiff out of the appropriation of March 3, 1845, for the survey of the public lands, direct from the treasury department, as a full compensation, at the rate of three dollars per mile, for every mile and part of a mile which should be actually surveyed and marked, random lines and offsets not included, provided the surveys, field notes, copies of field notes and plats, when returned, should be approved by the surveyor general; that the said articles, in all their terms and stipulations, were conformable to the laws of the United States and the usages, rules and regulations of the department having charge and superintendence of the public lands; that before entering into

the performance of said articles, the plaintiff took an oath faithfully and impartially to execute and fulfil the duties of a deputy surveyor, a certificate of which oath was indorsed on said articles, and did also enter into bond to the United States, with good and sufficient security, in the sum of two thousand dollars, for the faithful performance of said articles; that on the 24th of May, 1845, said Silas Reed was removed from said office of surveyor, and the defendant appointed thereto in his place; that the plaintiff performed the work according to the articles of agreement, and on the third of March, 1846, returned to the office of the defendant his original field notes, together with a fair and correct copy thereof, and a separate plat of each of the townships subdivided, and requested the defendant, as surveyor aforesaid, to receive and file in his office said field notes, copies and plats, examine and approve the same, and furnish to the plaintiff a certificate of such examination and approval, as by the duty of his said office, defendant was holden to do; and that the defendant, not regarding the duty of his office, *but maliciously contriving and intending to injure and oppress the plaintiff*, and wrongfully to deprive him of his just rights and dues under and by virtue of the articles aforesaid, *did wilfully, maliciously and unlawfully*, and without any just or reasonable cause, refuse to give a certificate of his approval or examination of said field notes, copies and plats, or any or either of them, or to examine, or in any way inspect the same, or to receive the same into his said office to be filed, or to permit them to be filed therein; by means of which plaintiff had been prevented from receiving any compensation for his labor.

The second count was like the first, except that it did not aver a performance of the work, but in lieu thereof, that the plaintiff set about preparing to complete and fulfil the contract on his part, and therein expended much time and money, and that he was ready and willing, and offered to the defendant, as such surveyor as aforesaid, to complete and fulfil the said contract, according to its true intent and meaning; but the defend-

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ant, well knowing the premises, but contriving and maliciously intending to injure and harass the plaintiff, and to deprive him of all benefit and advantage under his said contract, and to subject him to heavy loss and damage, did, in his capacity as surveyor as aforesaid, *wilfully, maliciously and unlawfully*, and in manifest violation of the duty of his said office, and without any just and reasonable cause, by his order in writing, declare the said contract to be null and void, and prohibit the plaintiff from fulfilling or attempting to fulfill said contract, according to its true intent and meaning.

The third count charged that the defendant, *contriving and maliciously intending* to injure and oppress the plaintiff, &c., in his capacity of surveyor as aforesaid, on the 29th of May, 1845, *wilfully, maliciously and unlawfully*, and in breach of the duty of his office, and without any just and reasonable cause, by his order in writing, did suspend the operation of said contract for an indefinite time thereafter, and did prohibit the plaintiff from fulfilling said contract and commencing any operations thereunder, and did continue such suspension and prohibition, during all the time mentioned in the contract for the fulfillment of the same, and thereby did hinder, obstruct and prevent the plaintiff from fulfilling the same.

The fourth count was substantially the same as the first, differing in no material respect, except that it avers a suspension of the contract for a space of time by the defendant, whereby plaintiff was prevented from completing it within the time limited by its terms; but it avers that he then went on and did the work with all practicable diligence and dispatch.

The defendant pleaded "not guilty."

At the trial, the plaintiff read in evidence the following letter of instructions from the commissioner of the general land office to Silas Reed, under which the latter acted in making the contract. Portions of the letter are omitted:

GENERAL LAND OFFICE, April 15, 1845.

SIR: By the act of congress entitled "An act making appropriations for the civil and diplomatic expenses of the gov-

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the performance of said articles, the plaintiff took an oath faithfully and impartially to execute and fulfil the duties of a deputy surveyor, a certificate of which oath was indorsed on said articles, and did also enter into bond to the United States, with good and sufficient security, in the sum of two thousand dollars, for the faithful performance of said articles; that on the 24th of May, 1845, said Silas Reed was removed from said office of surveyor, and the defendant appointed thereto in his place; that the plaintiff performed the work according to the articles of agreement, and on the third of March, 1846, returned to the office of the defendant his original field notes, together with a fair and correct copy thereof, and a separate plat of each of the townships subdivided, and requested the defendant, as surveyor aforesaid, to receive and file in his office said field notes, copies and plats, examine and approve the same, and furnish to the plaintiff a certificate of such examination and approval, as by the duty of his said office, defendant was holden to do; and that the defendant, not regarding the duty of his office, *but maliciously contriving and intending to injure and oppress the plaintiff*, and wrongfully to deprive him of his just rights and dues under and by virtue of the articles aforesaid, *did wilfully, maliciously and unlawfully*, and without any just or reasonable cause, refuse to give a certificate of his approval or examination of said field notes, copies and plats, or any or either of them, or to examine, or in any way inspect the same, or to receive the same into his said office to be filed, or to permit them to be filed therein; by means of which plaintiff had been prevented from receiving any compensation for his labor.

The second count was like the first, except that it did not aver a performance of the work, but in lieu thereof, that the plaintiff set about preparing to complete and fulfil the contract on his part, and therein expended much time and money, and that he was ready and willing, and offered to the defendant, as such surveyor as aforesaid, to complete and fulfil the said contract, according to its true intent and meaning; but the defend-

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ant, well knowing the premises, but contriving and maliciously intending to injure and harass the plaintiff, and to deprive him of all benefit and advantage under his said contract, and to subject him to heavy loss and damage, did, in his capacity as surveyor as aforesaid, *wilfully, maliciously and unlawfully*, and in manifest violation of the duty of his said office, and without any just and reasonable cause, by his order in writing, declare the said contract to be null and void, and prohibit the plaintiff from fulfilling or attempting to fulfill said contract, according to its true intent and meaning.

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The fourth count was substantially the same as the first, differing in no material respect, except that it avers a suspension of the contract for a space of time by the defendant, whereby plaintiff was prevented from completing it within the time limited by its terms; but it avers that he then went on and did the work with all practicable diligence and dispatch.

The defendant pleaded "not guilty."

At the trial, the plaintiff read in evidence the following letter of instructions from the commissioner of the general land office to Silas Reed, under which the latter acted in making the contract. Portions of the letter are omitted:

GENERAL LAND OFFICE, April 15, 1845.

SIR: By the act of congress entitled "An act making appropriations for the civil and diplomatic expenses of the gov-

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ernment for the year ending June 30, 1846, and for other purposes," approved March 3, 1846, \$1200 were appropriated for the correction of erroneous and defective surveys in Illinois and Missouri, at a rate not exceeding six dollars per mile; and of the \$100,000 appropriated by the same act for surveying the public lands, in addition to the unexpended balance of former appropriations, &c., the sum of \$14,500 has been apportioned to your district for surveys, and \$1573 for incidental expenses, making a total for these objects of \$16,073.

According to the estimate submitted in your last annual report, the first mentioned appropriation will enable you to complete all the erroneous and defective surveys therein referred to. The sum of \$16,073, apportioned to your district, is much smaller than the amount asked for, congress having appropriated only \$100,000 for the general purposes of surveying, instead of \$135,000 contained in the estimate of this office for that object; consequently, you will not be able to have all the work executed which is embraced in your estimate.

You will therefore contract for the survey of such of the lands only embraced in your estimate, as will best subserve the public interests, by commanding ready sale, or accommodating the settlers. *The surveys on the northern boundary of Missouri may be closed upon Sullivan's line, as far west as the surveys have been closed on that line in Iowa.* * * * *

As these appropriations are for the services of the year ending June 30, 1846, they will not be applied in payment for work executed prior to June 30, 1846, without special instructions; but as that period will probably arrive before the deputies can make their arrangements to take the field, you will at once contract for this work, using the most rigid economy which may be consistent with its correct execution, and under no circumstances will you pay more than the average price per mile fixed by law, *or contract for a greater amount of surveying than will be covered by your apportionment*; and that there may be no risk on this point, you will so estimate the amount of

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surveying in each contract that the amount estimated shall not certainly fall short of the actual amount of surveying to be done in it. * * *

Very respectfully, your obed't serv't,

THOMAS H. BLAKE, Com'r.

The plaintiff then read in evidence the contract between Silas Reed, surveyor general, and himself. It bore date May 10, 1845, and was in its terms as stated in the first count of the declaration. The signature of Silas Reed was witnessed by Edwin James, sr., and that of Warren Reed by Edwin James, jr. Upon it was indorsed the plaintiff's oath of office as a deputy surveyor, *dated October 13, 1845*. The oath was not in the precise form prescribed by instructions from the commissioner of the general land office, dated June 20, 1845. The bond was also read, bearing date May 10, 1845, signed by Warren Reed, as principal, and Edwin James, sr., as security, the signature of the former being witnessed by Edwin James, jr., and that of the latter by J. T. Sprigg. By instructions from the general land office, the bond was required to be for double the value of the contract. The present bond was for \$2,000, and it was in evidence that the work contracted for amounted to \$1,080. The contract, affidavit and bond were on the same sheet of paper, and were executed in triplicate, according to the practice of the office—one copy for the general land office, one for the deputy surveyor, and another to be filed in the surveyor general's office.

Silas Reed testified substantially as follows, in regard to the execution of the contract: Plaintiff left St. Louis on the 15th of April, 1845, to execute other surveying contracts in the western part of the state, having received a commission as a deputy surveyor. The commission, which was read in evidence, was by its terms to be held "during the pleasure of the surveyor general for the time being." Before leaving, plaintiff signed the present contract in blank. During his (S. R.'s) term of office, it was a common practice for deputies, before going out to execute contracts, to leave their signatures to other

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blank contracts. This practice was adopted in order that the contracts might be sent by mail, and the deputies kept in the field. It was the result of written instructions and verbal suggestions of the commissioner of the general land office. On the 10th of May, he (S. R.) signed the contract, and gave it to his clerk to fill up. At the same time, E. James, sr., signed the bond as security, and was approved as such, and witnessed his (S. R.'s) signature to the contract. Soon after May 10th, and before he (S. R.) knew of his removal from office, he sent off the duplicate and triplicate of the contract to the plaintiff by mail, to have his signature witnessed in the field. He (S. R.) first knew of his removal May 22d.

It appeared in evidence that Silas Reed, before his removal from office, entered into eleven contracts, bearing date at different times, between the 1st and 13th of May. Among others, was one with George W. Sargeant, one with William Shields, and another with E. James, sr. and E. James, jr., all bearing date May 10th.

Renard, a clerk in the surveyor general's office, and a witness for defendant, testified that he informed S. Reed of his removal from office on the evening of May 21st, and that on the same evening, Reed asked him if he had better give contracts to Sargeant and Shields. Witness advised him to leave it to his successor. Reed, however, said that he would fill up the contracts that night. Next morning, he handed Sargeant's contract to witness to copy. It was dated May 10th. Witness called the attention of Sprigg, another clerk, to the date. He had no reason for suspecting that Reed's contract was antedated, except the fact that Sargeant's was. He was copying clerk. On and after the 22d of May, he received for record nine letters dated May 12th, inclosing contracts. One of these was Silas Reed's letter to Warren Reed. Witness was sick between the 16th and 21st of May, and no letters were recorded between those dates.

After Conway's accession to the office, and on the 29th of May, 1845, he wrote to the plaintiff notifying him not to pro-

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ceed under his contract until further advised. At the same time, he wrote to the commissioner of the general land office that he had suspended the eleven contracts entered into by Silas Reed between the 1st and 13th of May, assigning the following reasons for the suspension: 1. No instructions to enter into such contracts were found on file. 2. He doubted the propriety of entering into new contracts before the old ones were completed and approved. 3. He was ignorant of, or doubted the capacity of some of those to whom contracts had been given. 4. The contracts appeared to have been entered into in a hurry, in view of the appointment of a new surveyor general.

On the 10th of June, 1845, the commissioner wrote to Conway, doubting the propriety of suspending contracts, unless for the dishonesty or want of skill of the deputies, or that sufficient security had not been given, but disclaiming any right to interfere in the matter. In June, 1845, Conway removed the suspension from all the contracts except that of plaintiff and the Messrs. James. In July, plaintiff returned the duplicate of the contract by mail to the office of the surveyor general, where it remained until October.

In consequence of the suspension, plaintiff did not proceed under his contract during the summer of 1845. In October of that year, he came to St. Louis. Soon afterwards, Silas Reed called upon Conway and asked him what he intended to do with the suspended contracts of his brother and the Messrs. James. After some conversation, as Silas Reed testified, Conway told him that his brother could go on with his contract, but that the Messrs. James must relinquish some five or six townships of their's, as the work contracted for would overrun the appropriation. On the 13th of October, plaintiff called to get his contract, in order to supply the defects which were pointed out by Sprigg. These were, that the signature of James, as security in the bond, was not witnessed, and the oath was not taken. James came up and acknowledged his signature, and Sprigg witnessed it. Plaintiff then went before a magistrate with the

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contract and took the oath. On the 15th of October, he started on a boat for the field of operations, leaving the contract with his brother to return to the office. Soon afterwards, Silas Reed called to deliver the contract at the office, when he saw a letter written by Conway to the commissioner of the general land office, dated October 13th, in which he stated that he should annul the contracts of plaintiff and the Messrs. James, unless they relinquished six out of the twenty-one townships embraced in them. S. R. did not deliver the contract then, but waited to see what Conway would do. On the 17th of October, Conway wrote to the commissioner that Warren Reed and the Messrs. James had declined to relinquish any part of the work embraced in their contracts, and he therefore considered them null and void. On the same day, he wrote to plaintiff that he had annulled his contract, and should let out the work to other persons. On the 25th of October, Silas Reed sent the contract to Conway to be filed in his office. On the 28th of October, Conway returned the contract to S. Reed by letter, informing him that it had been annulled, and could not be taken notice of. On the 29th of October, Conway wrote to Warren Reed revoking his commission as a deputy surveyor.

To prove performance of the contract, plaintiff read in evidence the deposition of John S. Sheller, who testified that plaintiff surveyed the townships named in his contract, commencing about November 10th, 1845, and finishing about January 19th, 1846; that he assisted in the execution, and that the work was done well, according to instructions, and under the immediate superintendence of Warren Reed. On cross-examination, he stated that plaintiff was not present more than about one third of the time while the work was being executed. During his absence, the field notes were taken by witness in slips on the field. The field notes kept by plaintiff were taken in the same way generally. The field notes taken by witness were generally examined by plaintiff in camp at night. Plaintiff could not, from an examination of the notes taken by witness, have detected any omissions in making corners or

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blazing trees. All the plats were made out by witness, in the presence, and under the directions of plaintiff. Plaintiff was in the camp, in the neighborhood of operations, during all the time the work was going on, except a day or two. Witness was a sworn deputy, received from plaintiff twenty-five cents a mile, and in his absence, performed all the work that he would have done if he had been present. After plaintiff had commenced the work, he informed witness that he had received a communication from the surveyor general annulling his contract, and also a notice of the revocation of his commission, but plaintiff continued on and completed his work.

There was evidence that, after the completion of the work, and in March, 1846, the plaintiff tendered his field notes at the office of Conway for examination, and that Conway refused to receive them.

There was evidence to show that a portion of the land included in Warren Reed's contract was north of Sullivan's line.

There was evidence tending to show that the security in the plaintiff's bond was good, and that no objection was made by Conway to his sufficiency, and there was other evidence tending to show that Conway did object to the security.

The following instructions, among a large number of others, were asked by defendant and refused :

9. The defendant is not responsible in this action for the consequences of his decision in suspending the execution of said supposed contract, or in declaring the same null, or in refusing to receive the field notes and plats of plaintiff, tendered as having been made by him in performance of the work mentioned in said contract.

10. If the jury find from the evidence, that the acts of the defendant, charged as grievances in the declaration in this case, were, so far as any such have been proved, official acts, performed by him while he was surveyor general of the public lands of Illinois and Missouri, touching the surveys of public lands within this jurisdiction, and respecting the contracting for

and performing and returning such work by a deputy surveyor, they will find for the defendant.

15. If there can be any recovery at all in this case, it must be on the ground that the defendant acted illegally, to the injury of plaintiff, in the matters specified in the declaration, and also, that he thus acted, with knowledge that his action was illegal. If his conduct, in the points complained of in the declaration, was with the intention of doing his official duty, and with the belief, at the time, that he was doing it, there can be no recovery by the plaintiff.

16. There can be no recovery in this action, unless the plaintiff shall prove, 1st, that defendant acted illegally, to the injury of the plaintiff, in the matters stated in the declaration; 2d, that *defendant also acted maliciously and knowingly wrong in these matters*; 3d, that the plaintiff had performed all requisites prescribed by the rules and regulations of said surveyor general's office to deputy surveyors, and binding on the plaintiff as a deputy, in order to his having the right to proceed to said work; 4th, that the plaintiff performed said work according to the contract, and to the laws, rules and regulations governing such surveys; and 5th, that plaintiff made his returns to the office of the surveyor general, of field notes and plats of said work, in due form and according to said regulations.

A large number of instructions were given for the plaintiff, but none of them made his right of recovery depend upon the *motives* of the defendant.

After a verdict and judgment for the plaintiff, the defendant appealed to this court.

Geyer & Dayton, for appellant, among other points, made the following: No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper,

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they are in their nature judicial, and he is exempt from responsibility by action for the motives which influence him, and the manner in which such duties are performed. (*Wilson v. Mayor, &c.*, 1 Denio, 599. 3 Howard, 87, 97, 98. 3 B. & B. 275.) Officers required by law to exercise their judgment are not answerable for a mistake of law, or mere errors of judgment, without any fraud or malice. (*Jenkins v. Walden*, 11 J. R. 114. *Ib.* 180. 3 Denio, 117, 120, 2 Caines, 312. 4 Howard, 131.)

R. M. Field, for respondent. I. The surveying contract proved by the plaintiff below was binding on the United States and all its officers. (*U. S. v. Tingey*, 5 Peters, 115. *U. S. v. Bradley*, 10 Peters, 343. Opinion of Att'y General Wirt, 1 Opin. Att'y Gen'ls, p. 343. Act March 3, 1831, to create surveyor for Louisiana, sec. 4.) II. The defendant having undertaken to suspend and then to annul the contract, and having violated the rights of the plaintiff under it, by refusing to receive his notes, or to permit him to file them in his office, so as to obtain the benefit of his contract, is liable for all the damage sustained. (Story's Eq. §320 *et seq.* *Turner v. Sterling*, 2 Vent. 26. *Ashby v. White*, 2 Ld. Ray. 938. *Lincoln v. Hapgood*, 11 Mass. 350. *Freeman v. Otis*, 9 Mass. 272. Cowper, 161. 4 Howard, 131. 7 Howard, 130. 12 Howard, 404.)

RYLAND, Judge, delivered the opinion of the court.

From the great number of the questions and the points made in this case, were the court to express its views on each one, would require it to extend the opinion to very great length. I do not think it necessary to notice many of the points made, as there are some plain and general propositions, well settled, which must govern and determine this case.

It will be seen from the facts set forth in the statement of the case, that this was a suit brought by a deputy surveyor against the surveyor general of the United States for Illinois

and Missouri, charging him with wrongfully and maliciously refusing to receive and approve surveys made by such deputy, as set forth in the first count of his declaration. In the second count, for maliciously annulling and avoiding his contract for surveying, after he had commenced fulfilling it. In the third count, for maliciously and indefinitely suspending the contract, whereby he (plaintiff) was prevented from performing the same. In the fourth count, for maliciously suspending the contract for a time, by which he was delayed in the performance of the contract, and for refusing to receive, inspect or approve his work, whereby plaintiff lost the benefit of his labor and of his contract. The defendant pleaded not guilty. From the great mass of evidence, it will be found that Silas Reed was surveyor general of Illinois and Missouri; that he was removed from office in May, 1845; and that Frederick R. Conway, the defendant, was appointed to fill Reed's vacancy. The plaintiff in this action is brother of Silas Reed. The articles of agreement made between Silas Reed and Warren Reed, by which Warren was to survey certain townships of land, being townships 65, 66 and 67, north, ranges 39 and 40 west of the fifth principal meridian, was dated May 10th, 1845. The affidavit indorsed on the agreement, was dated 13th October, 1845, upwards of five months after the date of the agreement. The bond of Warren Reed, with Edwin James, sr., as security, was dated May 10th, 1845. The witness, Sprigg, says he witnessed the bond, as he supposes, about the 13th of October, 1845. He thinks the bond was signed about October 13th. Warren Reed came to the office; witness supposed the difficulties settled; witness handed him his bond for completion, pointed out its defects; these were, the oath was not taken—the signature of Edwin James, sr., as security, was not witnessed—the oath was not indorsed on the contract. Witness says he first saw the contract on July 9th; he thinks it was then returned to the office. Conway took possession of the office about May 24th. Witness says Conway refused to receive this agreement. Silas Reed stated that the contract was signed by his brother in blank

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in April, and was signed by him (witness) in May, after being sent to his brother in the field : says the reason he sent it was this : he was admonished by the department to get good deputies and keep them in the field all the time. A witness, Adolph Renard, said he was a clerk in the surveyor general's office in 1845, and had been since 1837 ; was clerk at the time Silas Reed was removed, on the 23d or 24th of May, 1845. Reed's removal was known in St. Louis at noon on the 21st, when the mail came in, by letters ; on the evening of May 21st, at 4 or 5 o'clock, Reed took the witness to his room ; witness told him that Conway was appointed. Reed asked the witness if he could give contracts to Sargeant and Shields ? Witness said he'd better leave it to Conway ; Reed said he would make the contracts that night, and that the witness could come early next morning. Witness said, "I came and copied the contract to Sargeant ; I don't recollect that Reed asked my advice as to his right to make these contracts ; he only asked me if he had better give contracts to Sargeant and Shields ; that to Sargeant I copied next morning ; it was a rough draft in Reed's writing ; don't remember the date. I had one contract for Sargeant, dated May 10th ; Reed said he would fill it up and prepare it at home that night, 21st ; I believe it was filled up in the writing of Dr. James ; I never saw Shield's contract until it came back ; I filled up the instructions only to Sargeant ; the date of the contract, on the 10th, attracted my attention on the 21st, and on the 22d, I showed it to Sprigg. Respecting the other contracts, Reed said no more to me than I have stated ; the letter to Shields and Sargeant, inclosing these contracts, was written on the 16th or 17th of May ; I was sick from the 16th to the 21st, and the letters written were not recorded between these dates. On the 22d, I received them all at my house to record ; the clerk came on the 22d or 23d, with a letter dated May 12th, to Shields, to have put back in its place on the book. I took all that were given to me ; I don't know when that letter to Shields actually was written ; I put the letter to Shields back in its place, as a letter of 12th May ; the in-

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struction of the clerk to me was, to put the letter back in the place of its date, so as not to come after other letters of a subsequent date. The letter to Sargeant, I received to record on the 22d or 23d; when I went home sick, I took it home. I had no idea when it was written, except from the conversation of Dr. Reed on the evening of the 21st May; by referring to the letter book, I find that there are nine letters inclosing contracts, dated May 12th; I got none of these letters to record prior to the 22d; the drafts of letters we dated for the records. The surveyor general makes drafts, and from these are made letters to be sent. In this case they had accumulated; I don't know who copied from the draft the letters to be sent off; I was sick myself; I had no means of knowing that the nine letters, except Shields' and Sargeant's, were or were not written at the date they bore. I told all this conversation on the evening of the 21st with Reed, to Conway; I probably told Conway that all was not right, when I saw, on the 21st, the date of the 10th on the contracts of Shields and Sargeant; but it is four years ago, and I do not well recollect. I know nothing of those contracts except to Sargeant and Shields; it was not the practice to fill up contracts out of the office; these two contracts Reed said he would take home and fill up and bring back the next morning; all this I told Conway. I told Conway that, in my opinion, these two contracts were ante-dated; I told James that I would lay this matter before the general land office, and also before Conway; there was no discussion as to the mode of action; I did make a communication to the defendant, I believe; I recollect no contract with Dr. James of May 10th; I did write to the general land office myself about the matter; I don't know when the letters to Shields and Sargeant were sent, but I believe they were sent after they were recorded; I don't recollect when I finished recording them; it was three or four days I suppose; they were all recorded at one time—Warren Reed's letter among the rest; don't know when Warren Reed's letter was sent; I only saw the draft of the letter, and never the letter itself. Witness said he had no reason to suppose War-

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ren Reed's contract was ante-dated ; says he believes they were all dated right, except Shields' and Sargeant's. Witness says he often heard Conway say that Dr. James was not sufficient security for that contract."

Conway comes into the office of surveyor general on 24th May, 1845. He has been informed of the contracts made by Silas Reed with Shields and Sargeant — these contracts spoken about, and inquiry made by Reed of one of the clerks in the office, on the 21st of May, in regard to the propriety of making them, evidently impressing the clerk with the idea that they were not then made ; yet on the next morning, 22d May, the clerk finds the contract with Sargeant dated May 10th. That attracts so much his attention, that he calls the attention of Mr. Sprigg, another clerk in the same office, to the transaction ; writes to the department at Washington about it, and lays the same before Conway, the new officer ; tells him he believes all is not right. Here are other contracts dated 12th May—among these, the contract of the plaintiff, Warren Reed, to which this action owes its origin, Conways' suspicions might well be awakened ; the clerk's obviously were.

Let us now turn to the powers and duties of the surveyor general. On the 18th May, 1796, the office of surveyor general was, by act of congress, first created ; his duties were to engage a sufficient number of skillful surveyors, as his deputies, whom he shall cause, without delay, to survey and mark the unascertained outlines of the lands lying north-west of the river Ohio, and above the mouth of the river Kentucky, in which the titles of the Indian tribes have been extinguished, and to divide the same in the manner hereinafter directed : he shall have authority to frame regulations and instructions for the government of his deputies ; to administer the necessary oaths upon their appointments ; and to remove them for negligence or misconduct in office. (1st U. S. S. at large, 464.)

The surveyor general of Illinois and Missouri was created by act of congress of 29th April, 1816, with same general powers

of the surveyor general of the lands north-west of Ohio. (3 U. S. Statutes, 325.)

By these acts, the surveyor general is an executive officer, with ministerial duties, and also with judicial powers in some cases. He must decide as to the qualifications and skill of his deputies : he must decide as to the correctness of the work—the sufficiency of the bond, as regards the security of his deputies ; has power to administer the oath of office to his deputies : he can remove from office for negligence or misconduct ; can, consequently, institute investigations in regard to such matters, and can decide and determine the same ; must often decide according to his own judgment in matters connected with the public interest and welfare, in regard to the surveys of the public lands ; can frame regulations and instructions for the government of his deputies, and, as a matter of course, can require obedience and conformity to such regulations and instructions. See Opinion of Att'y General Wirt below. Opinions U. S. Att'y Gen'ls, 1 vol. p. 433.

“ This act imposes upon the surveyor the following duties :

1. To engage a sufficient number of skillful surveyors as his deputies.

2. To cause so much of the land as the president of the United States should direct, &c., to be surveyed, divided in the manner in which the surveyor general had been authorized to do, &c.

3. To do and perform all other acts which the surveyor general was authorized and directed to do, with regard to the lands under his charge.

4. To do and perform all and singular the duties required by law to be performed by the principal deputy surveyor for the territory of Missouri.

5. To fix the compensation of the deputy surveyors, chain-carriers and axe-men : *Provided*, that the whole expense of surveying and marking the lines should not exceed three dollars for every mile that should be run and surveyed.

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This act having, by reference, devolved on the surveyor of Illinois and Missouri, the same duties which had, by previous law, been prescribed for the surveyor of the United States and the principal deputy for the territory of Missouri, it becomes necessary to turn to the laws which prescribe these duties.

• *The Surveyor General.*—This officer was appointed under the act of the 18th May, 1796, “providing for the sale of lands of the United States in the territory north-west of the Ohio and above the mouth of the Kentucky river.” His duties prescribed by law are :

1. To engage a sufficient number of skillful surveyors as his deputies.
2. To cause his deputies, without delay, to survey and mark the unascertained outlines, &c., and to divide the same in the manner therein dictated.
3. To frame regulations and instructions for the government of his deputies.
4. To administer to his deputies the necessary oaths, upon their appointment.
5. To remove those deputies for negligence or misconduct in office.
6. From the field books returned to him by his deputies, to cause a description of the whole lands surveyed to be made out ; a fair plat to be made of the townships, and fractional parts of townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners.
7. To cause the plat so made to be recorded in books to be kept for that purpose, a copy whereof is to be kept open, at the surveyor general’s office, for public information, and other copies to be sent to the places of sale, and to the secretary of the treasury.

The Principal Deputy Surveyor of Missouri.—The only duty of this officer which it is necessary to notice, on account of the reference made to those duties under the law under which General Rector was appointed, is that which requires this prin-

cipal deputy to execute himself, or cause to be executed by his deputies, such surveys as may be authorized by law.

As the skillful deputies so required by the law to be appointed by the surveyor in chief, are placed under his superintendence; as he is made responsible, in the first instance, for the judiciousness of the selection, and by the power and duty of removing them for negligence or misconduct in office, is made responsible for the manner in which they perform their duties, it becomes necessary to inquire what those duties are. The duties of the deputies, as prescribed by the act of the 18th May, 1796, are :

1. To proceed, without delay, to survey and mark the unascertained out lines, &c., and to divide the same in the manner directed by that act: that is, the *deputies themselves* are to do this work, and the surveyor general is expressly required to cause them to do it.

2. To cause to be marked on a tree, near each corner, within the section, the number of such section, and over it, the number of the township within which such section may be.

3. *The deputies shall carefully note, in their respective field books, the names of the corner trees marked, and the number so made.*

4. To divide the fractional parts of townships into sections, in the manner required by law, and to annex the fractions of sections to the adjacent entire sections.

5. To mark all the lines plainly upon trees, and to measure those lines with chains containing two perches of sixteen and a half feet each, subdivided into twenty-five equal links; which chain shall be adjusted to a standard to be kept for that purpose.

6. *Each deputy surveyor is ordered to note in his field book the true situation of all mines, salt licks, salt springs, and mill seats which shall come to his knowledge; and to note, also, in his field book, all water courses over which the lines run by him shall pass, and also the quality of the land.*

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7. To return the field books so made out to the surveyor general, who shall therefrom cause a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales.

It is manifest, from this view of the laws, that the national legislature has confided the very important business of surveying the public lands to *deputy surveyors only*; with regard to whom it has prescribed the following guards:

1. That they shall be selected by the surveyor general for their skill.

2. That they shall be sworn by the surveyor general to the faithful performance of their duty.

3. That they shall act under regulations and instructions framed for their government by the surveyor general.

4. That they shall be removable, at the pleasure of the surveyor general, for negligence or misconduct in office.

It may not be amiss to notice, also, a species of lateral check which the law has placed on the work thus to be done by the deputies; it arises from the duty imposed on the surveyor to cause to be deduced from the field books returned by his deputies a fair plat of all the townships and fractional parts of townships contained in the land described in those field books—a process calculated to detect any inaccuracy in the work returned by the deputy; and much better calculated to detect it than if the deputy himself had been required to make the plat, and the surveyor general merely to examine the plat so made; because the first is a more secure process and less liable to oversight and neglect than the latter.

The act of 29th April, 1816, under which Gen. Rector was appointed, after fixing his salary at a thousand dollars, authorizes him to receive from individuals, “for recording the surveys executed by any of his deputies, at the rate of twenty-five cents for every mile of the boundary line of such survey;” which is further confirmation, if any were required, that the law contemplates no survey but such as are executed *by the deputies themselves.*”

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Now an officer of these powers, and with the burden on him of a faithful discharge of these duties—just coming into office, receiving unfavorable impressions from those who had a right to know, and who did know the conduct of his predecessor—seeking for information of such contracts just made, and finding no such agreements, or contracts, nor bonds of such contractors on the files of his office as were required by law and the regulations of the department, might very properly think that all was not right.

The plaintiff bases his right of recovery in this case on two main grounds. 1st, the binding obligation of the surveying contract made between Silas Reed, the surveyor general, and himself, on the United States and all its officers. 2d, the defendant, by suspending the contract and afterwards annulling it, violated the rights of the plaintiff under the contract, by refusing to receive his notes or permit him to file them in his office, so as to obtain the benefit of his contract, and is liable to plaintiff for all damages sustained.

Without undertaking to decide upon the validity of the contract, for it may be a binding contract and yet the defendant not liable in this action, I shall pass to the second proposition, for that I consider the main question in this case. Yet it may not be amiss to give some hints on one important matter in relation to these surveying contracts. The practice of sending out from the office blank agreements to the deputy surveyors in the field, for surveying other lands than those originally contracted for; that is, agreements left blank as to townships, ranges, &c.; blank as to quantity of lands to be surveyed, and these agreements to be filled up and sworn to, as may best suit the deputy, is a practice fraught with so much evil, as to merit the reprobation of the courts of justice of the country.

Let us for a moment contemplate this matter. Here comes to the deputy surveyor in the field a blank agreement for another survey of the public lands; the townships are left blank; the ranges are left blank; it may be filled by inserting any reasonable number of townships, from one to ten or twenty, as the case

may be, and with any range. The surveyor knows the country ; he selects his townships and his ranges, so as to fill his blank agreement with lands in that portion of the country most easily surveyed : he may skip one township or range, because it is broken or mountainous, or because it is cut through by a water course, or because it contains lakes, or any other difficulty or obstruction to ordinary field work ; select the part most accessible, and most propitious for field work, and throw the most difficult township and ranges upon the hands of less favored deputies. Such may and would be the result, by the surveyor general sending out to the field the blank agreements for public surveys, to be there filled up by such deputies as he might see proper and fit to trust. Let the agreements and bonds and affidavits all be prepared, and properly executed, and then let the work begin.

There can also be no room for doubting that the personal supervision of the deputy is necessary, before he can make the certificate to be attached to the field notes. He cannot employ an assistant, though such assistant be a sworn deputy himself. The regulations require the personal services ; the personal supervision of the deputy himself : he must do the work himself, or at least be present during the operation. "The law does not recognize such officers as the *assistant surveyors* of the deputy surveyors ; for it contemplates the *deputies themselves* as bound to perform *in person* the duties prescribed by law to them." Att'y Gen. Wirt's Opinion. 1 vol. Opin. Att'y Gen. 435.

1. I come now to the main question. Is the surveyor general liable to an action by a deputy surveyor, for annulling his contract, revoking his appointment, refusing to receive and file his work or approve the same, so that he may get his compensation ? This is an important question ; it has been felt as such, and has met with due reflection and consideration.

From a careful examination of authorities from the case of *Turner v. Sterling*, 23d Charles II., reported in 2 Ventris, 26, down to our own times, both in the English and American

courts, the doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a *quasi* judge, is not responsible to any one receiving an injury from such act, unless the officer act maliciously and wilfully wrong, is most clearly established and maintained.

The case of *Ashby v. White*, is relied on by the plaintiff in support of his action. I will notice this hereafter. In the case of *Turner v. Sterling*, 2 Vent. 26, the plaintiff charged "that the defendant, not minding the execution of his office, but violating the law and custom of the city, did then and there *maliciously* refuse the numbering of the polls," &c. Three judges here held that the action was maintainable, against the opinion of Chief Justice Vaughn. This was afterwards affirmed in King's Bench. *Ashby v. White*, 2 Lord Raymond, 938 : In this case, it was held, that a man who has a right to vote at any election, for members of parliament, may maintain an action against the returning officer, for refusing to admit his vote. The declaration contains an averment, that the act was done *fraudulenter et malitiose*. After verdict for plaintiff, on not guilty pleaded, it was moved in arrest of judgment, that the action was not maintainable, and three of the four judges were in favor of the motion—Chief Justice Holt against it. This judgment was afterwards reversed in the House of Lords. But from one of the resolves in the House of Lords, in this case, it may be seen that they held the matter actionable, by reason of the malicious conduct, as charged, of the defendant. Lord Holt held, that the defendant was not a judge, nor any thing like a judge, but only an officer to execute a precept. Justice Gould considered the defendant a judge; Justice Powys, a *quasi* judge, and Justice Powell thought the defendant no judge, nor *quasi* judge. This last case, then, may be considered as one not contrary to the general doctrine, that, for a judicial act, within the authority and jurisdiction of a ministerial officer, such officer is, and can be liable to a party injured thereby, only when the act is done wilfully and maliciously wrong. In

Massachusetts, it was held, that an action lay against the selectmen for refusing to receive the vote of a qualified elector, although not chargeable with malice. *Lincoln v. Hapgood et al.* 11 Mass. 350. In delivering the opinion in this case, Parker, Chief Justice, says: "In consequence of an increased interest in elections, it has become a matter of serious consideration whether the selectmen of towns, acting fairly in discharge of a duty imposed upon them by law, shall be exposed to actions for a mere mistake of law, or misapprehension of facts; whether, in truth, they are not to be considered as *judge*, and so entitled to the common privilege of the judicial character, not to be punished, or to be responsible in damages, for any consequence of a judgment merely erroneous. I confess I have, for some time, maintained the affirmative upon this question, and have, in one or two instances, at *nisi prius*, given this opinion, reserving a right to the plaintiff to have the question decided by the whole court. But long reflection upon the subject, and the reasoning of those of my brethren, who have inclined to the opposite opinion, have finally satisfied me that I was mistaken." In this same opinion, the Chief Justice, after mentioning the cases of *Ashby v. White*, *Drewe v. Coulton*, *Harman v. Tappenden*, 1 East, 563, says: "It is fair to suppose, that an action of the case cannot now be maintained in England, for rejecting a vote, unless the injury is proved to have been done *maliciously*." In a note to this very case of *Lincoln v. Hapgood et al.*, the reporter says: "It would seem that the selectmen did not merely act ministerially, but judicially, in refusing the plaintiff's vote; and, in general, no action can be supported against any person acting judicially, within the limits of his jurisdiction, for any judicial act, however erroneous his decision or malicious his motive;" and cites 5 Mass. 547. 1 N. Hamp. 88. 1 Salk. 306. 2 T. R. 305. 5 T. R. 186. 11 Johns. 114. *Ld. Ray*, 466. 3 Maule & S. 325. 2 Bay, 169. 4 Bibb, 28. 3 Caines Rep. 170. 17 Johns. 145. This case, then, from 11 Mass. R., may be considered as not regarding the act of selectmen of towns, in rejecting a vote or refus-

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ing to receive a vote, as a *quasi* judicial, but merely as a ministerial act. This case cannot, then, be considered as an authority, where the act is a judicial one.

In the case of *Freeman v. Otis*, 9 Mass. Rep. 272, the court said that, "Where a public agent makes a contract in the name and behalf of the government, it is a point well settled, that the agent is not liable to the action of the party contracted with, who must look to the government. But if such agent should deny to the government that he had entered into such contract, and by such interference prevent the party from his remedy, as against the government, he must be personally liable, as he has by his conduct in effect disavowed his acting in the character of a public agent." This case does not contravene the proposition under investigation. It is a well settled principle that, where a man acts as agent for the public, and treats in that capacity, he is not personally liable.

In the case of *Mostyn v. Fabrigas*, Cowper's Rep. 161, nothing is found against this general proposition. One of the grounds of defence in that case was, that the defendant, being governor of Minorca, is answerable for no injury whatever done by him in that capacity. To this, it was answered, if the defendant has a justification, he must plead it, and that if the court had not a general jurisdiction of the subject matter, he must plead to the jurisdiction; cannot take advantage of it on general issue. Therefore, by the law of England, if an action be brought against a judge of record, for an act done by him in his judicial capacity, he must plead that he did it as judge of a court of record, and that will be a complete justification. So in this case; if the injury complained of had been done by the defendant, as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet sitting as a judge, in a court of justice, subject to a superior review, he would be within the reason of the rule, which the law of England says shall be a justification; but then he must plead it. But the sacredness of the defendant's person, as governor, will not justify him; and if it would, it

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must be pleaded. There is nothing in the remark of Lord Mansfield, except biting sarcasm, "that the action, if it did not lie against any other man, it shall, *most emphatically*, lie against the governor."

In the case of *Garland v. Davis*, (4 How. Rep. 149,) the opinion of the court was confined to a question on the pleadings, and no opinion on the merits was either formed or given by the court; the majority of the court thinking the pleadings were in such a state as to preclude them from giving any satisfactory opinion on the merits.

In *Wilkes v. Dinsman*, 7 How. Rep., January term, 1849, Supreme Court United States, p. 130-131, Justice Woodbury, in delivering the opinion of the court, says: "Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it; but for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none, under color of his office, however elevated or however humble the victim. (2 Carr. & P. 158, note. 4 Taunt. 67.) When not offending, under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used. (2 Greenl. Ev. §99.) The chief mistake below was, in looking only to such cases as a guide; for the justification rests here on a rule of law entirely different, though well settled, and is, "that the acts of a public officer, on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable. (*Gidley v. Lord Palmerston*, 3 Brod. & Bing. Rep. 275. *Vanderheyden v. Young*, 11 Johns. 150. 6 Harr. & Johns. 329. *Martin v. Mott*, 12 Wheat. 31.) This, too, is not on the principle merely that innocence and doing right

are to be presumed, till the contrary is shown; (1 Greenl. secs. 35-37;) but that the officer, being trusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided, in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression; or, in the words of Lord Mansfield, in *Wall v. McNamara*, that he exercised it as "if the heart is wrong." (2 C. & P. 158, note.) In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error. *Harman v. Tappenden et al.*, 1 East, 562-565, note. Justice Woodbury then proceeds: "It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and in this country, and even in this court, in illustration of the soundness of these positions. Thus, in *Drewe v. Coulton*, 1 East, 562, note, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J., says: "This is, in the nature of it, an action for a misbehavior of a public officer in his duty." Now I think that it cannot be called misbehavior, unless maliciously and wilfully done, and that the action will not lie for a mistake in law. By *wilful*, I understand contrary to a man's own conviction. In very few instances is an officer answerable for what he does to the best of his judgment, in cases where he is compellable to act; but the action lies where the officer has an option whether he will act or not." (See these last cases collected in *Seaman v. Patten*, 2 Caines, 313-315.)

In a case in this country, (*Jenkins v. Waldron*, 11 Johns. Rep. 121,) Spencer, J., says, for the whole court: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice." Similar views were again expressed by the same court, in same volume, p. 160, in *Van-*

derheyden v. Young. And in a like case, the Supreme Court of New Hampshire recognized a like principle. It is true, said the Chief Justice for the court, that moderators may decide wrongly with the best intentions, and then the party will be without remedy; and so may a court and jury decide wrongly, and then the party will be without remedy also. But there is no liability in such case, without malice alleged and proved. *Wheeler v. Patterson*, 1 N. H. Rep. 90. Finally, in this court, like views were expressed, through Justice Story, in *Martin v. Mott*, 12 Wheat. 31, "Whenever a statute gives a discretionary power to a person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statutes constitute him the sole and exclusive judge of the existence of those facts. Every public officer is presumed to act in obedience to his duty, until the contrary is shown." In the case of *Dinsman v. Wilkes*, (12 How. 404-405,) in 1851, Chief Justice Taney says, when the case was last before the court: "The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of; and this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict, is contained in a single proposition. It is this: If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command, and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or any degree increased or aggravated by malice or a vindictive feeling towards him, on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover." In *Kendall v. Stokes*, 3 Howard, 97, Chief Justice Taney, in delivering the opinion of the court, says: "We are not aware of any case in England or in this country, in which it has been held that a public officer, acting to the best

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of his judgment, and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. But a public officer is not liable to an action, if he falls into error in a case, where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion—even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischief. It is not necessary, we think, to refer to the many cases by which this doctrine is established. It was fully recognized in the case of *Gidley v. Lord Palmerston*, 3 B. & B. 275." In this case against Lord Palmerston, it was held that an action of assumpsit could not be maintained against the secretary at war by a retired clerk of the war office, for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, on the grounds that the secretary is only chargeable in his public and official character, and that an action cannot be maintained against him, as such, for any thing done by him in that character, although it may amount to a breach of employment, and constitute a particular and personal liability, as it would tend to expose him to an infinite number of actions, to be brought by any persons who might suppose themselves aggrieved. In *Rice v. Chute*, Lord Kenyon said: "That he could not conceive how the captain of a troop could be personally responsible for forage furnished the troops, whether he had received any money for that purpose or not." See note to *Freeman v. Otis*, 9 Mass. 264.

In the case of *Kendall v. Stokes*, Chief Justice Taney, speaking of the case of *Ferguson et al. v. Earl of Kinnowl, et al.*, 9 Clark & Finnelly, 251, which case was relied on by the counsel for the defendant in error, says: "This case is in no respect in conflict with the principles above stated; nor with the rule laid down in the case of *Gidley v. Lord Palmerston*." In the case from *Clark & Finnelly*, the point decided was, not only that the act was ministerial, but because

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it had been decided to be such by the highest judicial tribunal known to the laws of Great Britain. The refusal for which the suit was brought took place after the decision, and the learned Lords by whom the case was decided, held that the act of refusal, under such circumstances, was to be regarded as wilful and with knowledge; that the refusal to obey the lawful decree of a court of justice, was a wrong for which the party who had sustained injury by it might maintain an action, and recover damages against the wrong doer.

In *Weaver v. Devendorf*, 3 Denio, 120, it was held, that a public officer is not responsible in a civil suit, for a judicial determination, in a matter over which he had jurisdiction, however erroneous or however malicious the motive which produced it. Weaver sued Devendorf and two others before a justice of the peace, and declared against them in case, for that, being assessors of the town of Frankfort for the year 1843, they assessed the plaintiff's taxable property at \$1800, and in so doing, refused to allow him the benefit of the exemption to which he was entitled as a minister of the gospel; that they estimated his property at a higher rate than that of other taxable inhabitants of the town, and refused to make a deduction from his personal property, for debts owing by him, though he proved to their satisfaction that he owed such debts, by means of which he was taxed and obliged to pay a large sum, &c. In some of the counts, the defendant's conduct was charged to have been *wilful* and *corrupt*, and in others, careless and negligent. The defendants pleaded the general issue. The justice, after trial before him, rendered judgment for the plaintiff, which the Common Pleas reversed. The plaintiff brought error to the Supreme Court. Beardsley, J., delivered the opinion. The judge said, "the case might be disposed of on narrow grounds, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff or of any one else; and surely it will not be pretended they were liable for a mere error of judgment. But I prefer to place the decision on the broad

ground, that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer, for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest; to jurors, and to all public officers, whatever name they bear, in the exercise of judicial power. It, of course, applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable." Here follows a list of authorities, which I do not think necessary to insert.

In the case of *Wilson v. Mayor, &c.*, of New York, Beardsley, J., in delivering the opinion of the court, says: "And, although the officer may not, in strictness, be a judge, still, if his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong, which may have been done." 1 Denio, 599.

I do not think it necessary to cite further authorities to support the general proposition I laid down, viz: That where a ministerial officer does an act as a judge, or does a judicial act, which is within his power and jurisdiction, then, although an injury may arise to another, yet such officer is not liable to a civil action by the injured party, unless it be proved that the act was wilful and malicious. The cases from Denio go fur-

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ther, and exempt such officer thus acting from all liability to civil action, however malicious or corrupt his motives. Without agreeing to or dissenting from the views of the court in the two cases last cited, the authority of the highest courts in England and our country, will bear out the proposition, that the ministerial officer, acting judicially within his jurisdiction, is not liable, unless his acts be wilful and malicious. Now apply these principles to the case before us, and the judgment of the court below cannot stand.

I will, on purpose, forbear to comment on the evidence produced by the parties—will say nothing about the promptings and suggestions of the former surveyor general, nor of the letters and correspondence of the defendant. In looking over such a mass of testimony, it may be an easy matter to find exceptions to the admissibility of parts of it, which might well have been sustained. Nor will I notice the great number of instructions which the defendant asked for, and which the court refused to give. Those instructions calling on the court to tell the jury that they must find for the defendant, unless they, from the evidence, believed that he acted wilfully and maliciously in this transaction, ought to have been given. His liability alone depends on the malice and wilfulness of his acts in suspending, then annulling the contract, and in refusing to receive and approve the field notes and the work. If, from the whole transaction, taking into consideration the time of the making of the agreement, the affidavits, security to bond—the information received by defendant from the clerk in the department—the defendant's letters to the commissioner of the general land office—upon viewing the whole transaction, situation of the parties at the time, the jury should believe that Conway acted from his own judgment and conviction of what was right and proper to be done by him in the premises, to best promote the public good and the public interest, then they will find for him. But if, on the contrary, they believe he acted from *malice* or ill-will, or from a determination to oppress and harrass

the plaintiff, and to do him unjustly an injury, then they will find for the plaintiff.

The instructions for the plaintiff, about the malice and spite of the defendant being a ground to award a further sum to compensate for any vexation, are all wrong—the malice of the defendant, if there be any, being alone the ground upon which the action can be maintained. Now all the instructions refused, and all given, which are repugnant to and incompatible with the views of the court in this opinion, are improper and should not have been given.

We have said nothing about the survey of land in Iowa, not deeming that a question of much weight in this case.

The motives which induced the act of the defendant, in annulling the contract, in refusing to accept or receive or approve the work, are brought before the jury; and if, from all the facts and circumstances attending the whole affair, they shall believe that Conway was actuated, not by malice or spite or wilfulness, to injure, harass or oppress the plaintiff; but was acting from his own judgment and conviction, in what seemed to him to be best for the public good and public interest, although in such act he might be mistaken, yet he is not liable to the plaintiff under such circumstances. On the other hand, he is liable, if his conduct was contrary to his own judgment of what was right and proper, and was the offspring of spite or malicious feeling against the plaintiff. .

The judgment of the Circuit Court must be reversed and the cause remanded, Judge Scott concurring; Judge Gamble not sitting.

State v. Matthews.

THE STATE, Respondent, vs. MATTHEWS, Appellant.

1. A judgment of conviction in a criminal case cannot be sustained, where the record does not show that the defendant was ever in court until after verdict.
2. A party taking property under the direction of another, to whom he believed it to belong, is not guilty of larceny.
3. It is the duty of the court to instruct the jury in a criminal case. If the instructions asked are objectionable in their phraseology, the court should not neglect to give such as the law of the case requires.
4. Altering the mark of an animal is not larceny under the statute, unless done with the intention to steal or convert.

Appeal from Crawford Circuit Court.

Indictment for hog stealing. The indictment contained three counts.

The first count charged that the defendant, on, &c., with, &c., at, &c., "one hog of the value of five dollars, the personal property of Eli Wilson and Wm. Halliburton, then and there being found, then and there feloniously did steal, take and carry away, contrary to the form of the statute in such cases made and provided."

The second count charged that the defendant, on, &c., with, &c., at, &c., "one hog of the value of five dollars, of the personal property of Eli Wilson and Wm. Halliburton, then and there being found, did then and there unlawfully and feloniously mark, with intent then and there to steal and carry away, and convert the same to his own use." (R. C. 1845, p. 360, §38.)

The third count charged that the defendant on, &c., at, &c., "did then and there feloniously alter the ear marks of a hog of the value of two dollars, then and there being an animal, the subject of grand larceny, then and there being the property of Eli Wilson and Wm. Halliburton, then and there being found, with intent," &c. (R. C. 1845, p. 360, §38.)

The record did not show any plea by the defendant, nor that he was arraigned upon the indictment.

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The bill of exceptions showed that, at the trial, there was evidence tending to prove that Wilson and Halliburton had some hogs running in the woods, and that defendant caught one of them, carried it away, cut off its ears, and put his own mark upon it.

The defendant offered to show that he was at that time in the employ of Hoss, that he took the hog by the direction of Hoss, and that Hoss claimed the hog before and afterwards. This evidence was excluded, and defendant excepted.

Wilson, a witness for the State, testified that Hoss had said "it was a lie if defendant or any other man said that he had sent defendant into the woods to catch hogs for him." The defendant excepted to the admission of this evidence.

The defendant asked several instructions, all of which were refused, and he excepted. The first asserted that the jury could not convict the defendant unless they believed that he "wilfully altered the mark of the hog, with intent to steal, or convert the same to his own use." No instructions whatever were given. There was a verdict of "guilty." The defendant was afterwards brought into court in custody of the sheriff and sentenced.

After a motion for new trial overruled, he appealed.

C. Jones and *J. R. Arnold*, for appellant.

H. A. Clover, for the State.

RYLAND, Judge, delivered the opinion of the court.

1. The record of the proceedings of the Circuit Court in this case shows that the trial was had, and the defendant found guilty of grand larceny, without his having ever pleaded to the indictment or been arraigned in court. Indeed, no issue was presented for trial by the record, as certified to this court. The first time the defendant is mentioned as being in court is after the verdict of guilty has been rendered by the jury. He then is brought up in the custody of the sheriff to hear his sentence. There is such manifest error in the proceedings below, apparent

on the record, that the judgment cannot be sustained. It will be reversed and remanded.

2. As the case may be again tried, it may not be improper to make our views known upon some points which were raised on the trial below, so that the decision of the Circuit Court may be conformable thereto hereafter. The testimony of the witness, Wilson, in relation to the remarks of Mr. Hoss, about "its being a lie, if any body said he gave directions to catch hogs," &c., was illegal. This testimony should have been rejected. Mr. Hoss was himself a competent witness. He might have been summoned and examined. The witness, Wilson, was clearly testifying to what he had heard.

3. The testimony which the defendant offered to produce, showing that he was acting in the employment of another in catching and marking the hogs, was proper, and should have been admitted. It was, indeed, highly proper for him to show how he became engaged in this business of catching and tying hogs. If he was actuated by any request or directions of another to do this deed, thinking that the hogs were the property of such person, and that he had no design or intention to steal the hogs, it was doing him an injury to reject this testimony.

4. It was the duty of the court to instruct the jury as to the law of the case. The instructions asked by the defendant's counsel may have been objectionable in their phraseology, but the court should not, therefore, have neglected to give such as the law of the case required.

5. The marking of a hog or the altering of a mark of a hog must, in order to be a felony, be done with *intent* to steal or convert the same to the use of the person so marking or altering the mark. It is the intention with which the act is done that gives to it its criminality, and one of the instructions asked by the defendant's counsel was directed to this point, and should have been given.

The judgment of the Circuit Court is reversed, and the cause remanded, with the concurrence of the other judges.

THE STATE, Respondent, vs. JONES, Appellant.

1. Under our statute, an indictment for murder in the first degree must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly.
2. An indictment for murder, which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and there, in and upon the left side of the belly and also in and upon the right shoulder, one mortal wound," &c., is bad.
3. The part of the body where the wound was inflicted must be set forth with certainty.
4. Provocation is a question of law. (*State v. Dunn*, 18 Mo. Rep., affirmed.)

Appeal from Franklin Circuit Court.

The case is fully stated in the opinion of Judge Ryland. Among a large number of other instructions given by the court below, of its own motion, was the following:

12. If the jury believe from the evidence, that Jones killed Ashford suddenly, without any or without a considerable provocation, the law implies malice, and the homicide would be murder; but if they believe the provocation was great, they will find him guilty of manslaughter only.

The 13th instruction was of a similar character.

J. D. Stevenson, for appellant, among others, made the following points: 1. The court erred in leaving the sufficiency of the provocation to the jury. (*State v. Dunn*, 18 Mo. Rep.) 2. The indictment is bad.

H. A. Clover, for the State, insisted that no question could arise upon the instructions as to provocation, the jury having convicted the defendant of murder in the first degree, and as to the sufficiency of the indictment, cited 2 Hale, 185-6. 2 Hawk. P. C. c. 25, §81. 6 Binney, 183. 5 Yerg. 346. 13 Wend. 176. 1 Blackf. 65. Ib. 396.

RYLAND, Judge, delivered the opinion of the court.

Jones was indicted at a special term of the Circuit Court of Franklin county, in December, 1853, for the murder of Jeremiah W. Ashford. He was tried and convicted of murder in the first degree. A motion for a new trial being made and overruled, he then moved in arrest of judgment, which was also overruled. Exceptions being properly taken, an appeal was prayed and allowed.

The counsel for the appellant contends that the motion in arrest of judgment should have been sustained, by reason of the insufficiency of the indictment. This indictment is as follows :

“State of Missouri, county of Franklin, ss. Franklin Circuit Court—special term, December, 1853. The grand jurors of, &c., upon their oath present, that John H. Jones, late, &c., on, &c., with force and arms, at, &c., “in and upon one Jeremiah W. Ashford, in the peace of the state, then and there feloniously, wilfully and of his malice aforethought, *deliberate* and *premeditatedly* did make an assault, and that the said John H. Jones, with a certain knife, which he, the said John H. Jones, in his right hand then and there had and held, the said Jeremiah W. Ashford, in and upon the left side of the belly, and also in and upon the right shoulder of him, the said Jeremiah W. Ashford, then and there feloniously, wilfully and *deliberate* and *premeditated*, and of his malice aforethought, did strike and thrust, giving to the said Jeremiah W. Ashford, then and there, with the knife aforesaid, in and upon the left side of the belly, and also in and upon the right shoulder of him, the said Jeremiah W. Ashford, *one mortal wound*, of the breadth of three inches, and of the depth of six inches, of which said mortal wound he, the said Jeremiah W. Ashford, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, say that the said John H. Jones, the said Jeremiah W. Ashford, in manner and form aforesaid, feloniously, wilful-

ly and of his malice aforethought, *deliberate* and *premeditatedly* did kill and murder, contrary," &c.

1. Is this indictment, under our statute, sufficient to support a judgment for murder in the first degree?

A law of the territory of Louisiana, of which territory Missouri was then a part, passed November 4th, 1808, declared: "That if any person or persons shall, within this territory, commit the crime of wilful murder, such person or persons, on being convicted thereof, shall suffer death."

In 1825, the legislature of the state of Missouri declared "that every person who shall commit murder within this state shall, on being thereof convicted, suffer death." R. C. 1825, "Crimes and misdemeanors."

Under these statutes, an indictment for murder must have been framed as at common law. It required all the formality and particularity and certainty of a common law indictment for murder. We had to resort to the common law to find what constituted murder, and to test the sufficiency of an indictment therefor by its rules and decisions.

In 1835, the legislature of Missouri declared that "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree." All other kinds of murder, at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree." Under this statute, the practice has been to describe the murder as it is laid down thereby; if it be committed by means of poison, to state it so; if by lying in wait, to set it forth accordingly, and if by any other kind of wilful, deliberate and premeditated killing, to aver it to have been so done.

The first case reported under the statute of 1835, is the case of *Bower v. The State*, 5 Mo. Rep. 364. Since this case, it has been the practice, in indictments for murder, in order to

justify a conviction for that offence, in the first degree, to set forth the offence according to its nature and circumstances, as required by the statute. And, although the offence, as described, be murder in the first degree, yet a conviction for murder in the second degree, or for manslaughter, in any of its degrees, may be supported on such an indictment. *Watson v. State*, 5 Mo. Rep. 497. *State v. Mallerson*, 6 Mo. 399.

Although a different practice, under statutes using somewhat similar phrases in declaring what shall be murder in the first degree, and what in the second degree, has prevailed in the states of Pennsylvania, New York and Tennessee, (See *Com. v. White*, 6 Binney, 183. *The People v. Enoch*, 13 Wend. 159. *Mitchell v. State*, 5 Yerg. 340,) yet we consider it safest to follow the practice which has prevailed so long in our own state.

The indictment, then, in this case, is not sufficient to sustain a judgment which deprives the defendant of life. It is not drawn with accuracy sufficient. The words describing the offence are not sensible. Not only are the words used in the description of the offence, in the manner and form in which they are used, ungrammatical, but some of these words are not known and recognized as common English words.

2. There is another defect in this indictment which is fatal, even if we could suppose these omissions and words of description were only clerical blunders. I mean its repugnancy. The indictment charges that the defendant, of his malice aforethought, "did strike and thrust" the deceased, "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased, then and there, in and upon the left side of the belly, and also in and upon the right shoulder, *one* mortal wound, of the breadth of three inches, and of the depth of six inches, of which mortal wound he then and there instantly died." Now the indictment avers the giving of but one mortal wound by the blows and thrusts, and describes this as being given "on the left side of the belly," and also as being given on "the right shoulder," yet this wound is but of

the breadth of three inches, and of the depth of six inches. Where was this mortal wound given? Was it on the right shoulder? If so, it could not be on the left side of the belly. Was it on the left side of the belly? If so, it could not be on the right shoulder; yet it is charged to be on both, which is inconsistent and repugnant.

In the case of *Dias v. The State*, 7 Blackf. 20, the defendants, Samuel Dias and Hannah Gillman, were indicted for the murder of George Brock. The indictment charged, "That the said Samuel Dias and the said Hannah Gillman, with a certain axe, &c., the said George Brock, in and upon the *left* side of the head and over the left temple of him, the said George Brock, then and there feloniously and wilfully, and of their malice aforethought, did strike and beat, giving to the said George Brock, then and there, with the axe aforesaid, in and upon the *right* side of the head, of him, the said George Brock, and over the *right* temple of him, the said George Brock, one mortal wound, of the depth of three inches and of the breadth of six inches, of which said mortal wound the said George Brock, &c., on, &c., died." The charges are, that the persons indicted struck the deceased with an axe on the *left* side of the head, and over the *left* temple, giving to him, then and there, with said axe, on the *right* side of the head, and over the *right* temple, a mortal wound. Blackford, J., says, (after stating the case as above,) "there is in this part of the count a manifest repugnancy in the description of the offence as to the place of the wound; the first part of the sentence, that is, 'that the persons indicted struck the deceased with an axe on the *left* side of the head,' &c., being inconsistent with what follows, viz: their giving him then and there, with said axe, on the *right* side of the head, &c., a mortal wound; and this repugnancy occurs as it must occur, to be fatal, in a material part of the count; for the part of the body to which the violence was applied must be stated, and even if the wound be alleged to have been on the arm, hand, &c., without saying whether right or left, the indictment is bad. The proof, to be sure, need not correspond

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in this respect with the allegation, but the allegation itself cannot be dispensed with in the indictment." 3 Chitty Crim. L. 735. Arch. Crim. Pl. 384.

3. Where the death is charged to have been occasioned by a wound, a description of the wound must be set forth in the indictment, its length, breadth, depth, &c., where they are capable of description, and the omission of such description is fatal to the indictment; but where the death was occasioned by a bruise, a description of its dimensions is not necessary. *The State v. John Owen*, 1 Murphy, 452. *State v. Moses*, 2 Devereux, 463. In this last case, Judge Ruffin cites the case of the *State v. Owen*, 1 Murphy, 452, and says that, "at common law it was a fatal defect to omit to allege the depth of the wound in the indictment, but that the legislature had changed the law in that state since the case of the *State v. Owen*, and the decision in Owen's case gave rise to the change. There can be no doubt but that at common law it was necessary for an indictment for murder to set forth in what part of the body the wound was given. See 2 Haw. Pleas Crown, ch. 23, sec. 80. 4 Coke, 40, Young's case. In the case of *Rex v. Tomlinson*, 6 Carrington & Payne, 370, (25 Eng. Com. Law Rep. 442,) Godson, for the prisoner, submitted "that the indictment was bad, because it did not state the depth of the wound," but it was answered by the court "that common sense did not require the length, breadth and depth of the wounds to be stated; therefore it was not necessary they should be stated." Still the part of the body where the violence was inflicted must be set forth with certainty.

I do not deem it necessary to cite authorities upon this matter, more than what has already been done above. This case is very similar to the one from Blackford, *Dias v. State*. Here it is impossible to say where the mortal wound was inflicted; it is averred but one mortal wound was given, and that one on the left side of the belly, and on the right shoulder.

4. As the judgment will be reversed, it becomes necessary to

notice some instructions of which the defendant below complains.

In the case of *Dunn v. State*, decided at Jefferson City at July term of this court, 1853, (18 Mo. Rep.) it was held, that it was error to submit questions of law to a jury. In the language of the court, delivered by Judge Scott, it is said :

“ A question of law should not be referred to a jury. What is a sufficient provocation to make what otherwise would be murder, a less offence, is a question of law. The facts are found by the jury, and the court declares the law arising thence upon them, as they may be found. There can be no difficulty in such cases ; if there is evidence tending to establish the facts constituting a provocation sufficient to extenuate murder, the jury should be instructed hypothetically. If the opinion of the court is so, the jury should be directed that, if they believe the facts (recapitulating them) are established, which constituted the provocation, they should find according to the degree of extenuation such facts make in law. To tell the jury that, if the killing was done without sufficient provocation, it is murder, without informing them whether the facts offered in evidence, if established to their satisfaction, would constitute a provocation, is leaving them to determine what is a sufficient provocation to extenuate murder. They may think one thing or another, or any act, however venial, would be a sufficient provocation. So the definition of murder would depend, in each case, upon the passions or prejudices of jurors.”

The instructions given in this case, wherein the *sufficient provocation* is left to the jury, are, therefore, wrong. The instructions given by the court are very favorable for the prisoner, and, with the exception of leaving what is a sufficient provocation to extenuate murder to be considered by the jury, there is nothing contained in them of which the defendant below could properly complain. They were more favorable for him than the law strictly authorized. “ Whenever it appears from the whole evidence, that the crime was at the moment delibe-

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rately or intentionally executed, the killing is murder in the first degree." *State v. Dunn*, 18 Mo. Rep. 419.

It is deserving of serious reprehension to string out a case before a jury with instructions from one to twenty-six in number. A mind comprehending the facts of the case and the law arising thereon, can, with a few plain propositions lay the main questions before a jury, so as to enable them to arrive at a just and proper conclusion. The law, in this case, could have been explained and laid before the jury in less than half a dozen instructions.

Let the judgment of the court below be reversed, and the case remanded; the other judges concurring.

ROBARDS, Respondent, vs. MUNSON, Appellant.

1. If a material averment permitted to be inserted in a petition at the trial by way of amendment is unanswered, it is to be taken as admitted. But if the answer contains a defence to the petition with the additional averment, the court should proceed to try the case in the same manner as if the averment had been in the petition at first and was unanswered.

Appeal from Hannibal Court of Common Pleas.

The case is stated in the opinion of the court.

Lakenan, for appellant.

R. F. Richmond, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

This action was founded upon an agreement in writing between the parties, by which Robards was to take Munson to California, furnish him by the way with transportation and subsistence, and Munson was to perform many duties on the road which are specified, and after his arrival in California, was to labor under the control and supervision of Robards, and give him one half of the proceeds of his labor. The agreement con-

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tains many stipulations on each side. The petition alleges performance by the plaintiff of the stipulations of the agreement on his part, and several breaches of contract by the defendant, particularly charging the defendant with abandoning him on the way and failing to work for him in California. The defendant answers the petition, and in his answer, after denying the allegations of the petition, which aver performance by plaintiff, and after averring performance by defendant, he sets up several distinct breaches of the contract by the plaintiff, in failing to furnish the necessary food, transportation and accommodation by the way. The parties went to trial before a jury, and while it was in progress, the plaintiff amended his petition by correcting a mistake (as to place) made in one of the allegations in his petition, and by averring the performance, on his part, of one of the stipulations in the agreement, which he had not specifically averred in his original petition. There was not a new petition filed, but merely a paper containing the correction of the mistake in the original petition and the additional averment.

The defendant demurred to this amendment, and the court overruled the demurrer, and upon failure to answer, gave judgment upon the additional averment for a sum which was stated in it to be the expense incurred by the plaintiff by his performance, which, in that averment, was alleged. What is very remarkable in the case is, that the amendment, which was evidently a mere addition to the original petition, and contains no charge of breach of contract by defendant, is treated as a complete petition, and judgment is given upon it for the plaintiff, for an amount stated in it to have been expended by the plaintiff, and the court then directs the trial to proceed before the jury on the original petition and answer, and instructs the jury that the plaintiff cannot recover on his original petition, because he has already had judgment on the amendment. The jury, accordingly, found a verdict for the defendant, and judgment was given for him on the only petition which alleges any breach of contract by defendant. The parties each excepted to the

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decisions of the court, and the present appeal is prosecuted by the defendant.

1. The whole proceeding is wrong. The amendment to the petition was but the insertion of an additional averment in it, and if it was material, and was not answered, it was to be taken as admitted; but still, if the answer contained a defence to the petition, with this additional averment in it, the court should have proceeded to try the case just as it would have done if this averment had been in it at first, and was unanswered. The answer, in its denial of performance by plaintiff, and allegations of distinct failures to perform on his part, and in the averment of performance by defendant, or excuses for non-performance, such as consent by plaintiff, contained a defence which should have been tried, notwithstanding the amendment. The judgment against the defendant, as this record stands, is given upon a petition (if the amendment is to be regarded as a distinct petition,) which does not allege that the defendant has violated his agreement. So, the instruction given by the court, that the plaintiff could not recover on his original petition, grew out of the first error in giving judgment for the plaintiff on his amendment. The judgment of the Court of Common Pleas of the city of Hannibal, against the defendant, which is all that we can reach on this appeal, is reversed, and the cause remanded.

PHILLIPS & RAY, Plaintiffs in Error, *vs.* JONES' ADMINISTRATOR, Defendant in Error.

1. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one half A.'s interest in the metals and ores" that might be obtained. *Held*, A.'s interest in the outfit did not pass.

Error to Marion Circuit Court.

In 1849, Jones and others formed a joint stock company, for the purpose of going to California in quest of precious

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metals. Jones owned one share and a half of the outfit, to pay for which, he borrowed \$500 of Phillips & Ray, in consideration of which he executed to them a writing, by which he sold "one half his interest" in the company, and authorized them to receive from the manager or managers of said company "one half of all the gold or silver, ores or metals," to which he might be entitled on account of his one share and a half. A subsequent clause was as follows: "It is further agreed, that said Phillips & Ray are not partners in said company, but are only purchasers of one half said Jones' interest in the metals and ores that may be by him obtained as his share in the company." While the company were on their way to California, Jones died. The surviving members proceeded on to California, where they immediately sold their joint outfit and dissolved. Jones' proportion of the proceeds of the outfit was paid to George W. Lane, who afterwards executed to the administrator of Jones his note for the amount. The present suit was begun by Jones' administrator against Lane upon the note. Lane answered, admitting the execution of the note, but setting up the claim of Phillips & Ray, and praying that the parties might be compelled to interplead. Phillips & Ray thereupon filed their interplea, claiming the amount of the note, upon which an issue was made and found against them, the court refusing to instruct the jury, as asked, that the writing vested in Phillips & Ray one half of Jones' share in the outfit of the company. The interpleaders sued out this writ of error.

Glover & Richardson, for plaintiffs in error. 1. The conveyance by Jones to Phillips & Ray passed to them one half of his interest in the outfit of the company. This was the only interest in the company which Jones then had. It could not have been designed to leave out of the conveyance the outfit which the grantees had just advanced the money to pay for. 2. As the parties have consented that an issue should be made upon the interplea for the settlement of their rights, this court should now pass upon them.

T. L. Anderson, for defendant in error. By the express

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terms of the agreement, Phillips & Ray were not partners, and the only interest they acquired was in the ores, metals, &c.

SCOTT, Judge, delivered the opinion of the court.

As the question was not raised, we will not determine whether this was a proper case for an interpleader, and whether Lane would not have been entirely justified by the law in paying the note to the administrator, to whom he gave it. We are of the opinion that no part of the proceeds of the note belonged to the plaintiffs in error, Phillips & Ray. The first clause in the agreement, by which Jones, the intestate, conveyed to the plaintiffs in error one half of his interest in the California company, was, no doubt, sufficiently comprehensive to have included an interest in the stock of the company. But after these general words, it is stipulated, and that, too, it would seem, with a view to explain what had gone before, that Phillips & Ray should not be partners in the company, but only purchasers of one half of said Jones' interest in the metals and ores, that might be by Jones acquired as his share in the said company. Phillips & Ray could not but be partners, if they owned a share of the stock of the company. The only way to give effect to this stipulation would be, to divest them of all interest in the stock or outfit. But the subsequent words place the matter beyond all doubt. They were not to be partners, but only purchasers of one half of Jones' interest in the metals and ores that might be obtained as his share. The rule that every part of an instrument should have effect, in interpreting it, must be subservient to the more important rule, which requires that the whole deed must be taken together, in order to ascertain the intent of the parties.

The judgment is affirmed, the other judges concurring.

Hannibal and St. Joseph Railroad Co. v. Morton.

THE HANNIBAL AND ST. JOSEPH RAILROAD CO., Defendant in
Error, vs. MORTON, Plaintiff in Error.*

1. Under the charter of the Hannibal and St. Joseph railroad company, (Ses. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final.

Error to Marion Circuit Court.

This was a proceeding by the Hannibal and St. Joseph Railroad Company, under their charter, to run their road through the land of Samuel Morton. The proceeding was begun before the judge, during the sitting of the Marion Circuit Court. The entry upon the record, after the title of the cause, states that the notice to the judge was given by "Joshua Gentry, agent of said company," and that said agent prayed the appointment of viewers "to examine and view said land and assess the damages done thereto by reason of the location and construction of said road;" and that thereupon the court appointed viewers, who came and took the oath required by the charter of said company.

On the 28th of April, 1854, the viewers filed with the clerk in vacation their report of the damages assessed by them. On the 3d of May, Morton filed his objections to the report, which were sustained by the judge, and new viewers appointed "to review and examine the lands of the defendant, and assess the damages done thereto, by the construction and location of said road over the same, and report thereon." On the 1st of July, these reviewers filed their report with the clerk in vacation. The report, after reciting that they had been appointed to examine the land of Morton "and report what damages will be

* Another case by the same company against David Morton, of precisely the same character with the above, was decided at the same time, the writ of error being dismissed.

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done thereto by reason of the construction of the road," &c., states that, having first taken an "oath faithfully and impartially to discharge the duties" of their appointment, they went upon and examined the lands of Morton, and assessed "the damages *done to said lands*, by reason of the location and construction of said road over the same," at \$150, &c. *

On the 4th of July, Morton filed with the clerk in vacation his objections to this report. On the 6th of July, the clerk in vacation entered judgment upon the report. On the 24th of August, before the judge of the Circuit Court, which was then sitting, Morton filed his motion to set aside the judgment entered by the clerk in vacation, which was overruled. He then filed a motion to set aside the report, and also "a motion for leave to introduce proof as to damages found by commissioners," both of which motions were overruled. He then filed his bill of exceptions, and sued out this writ of error.

Glover & Richardson, for plaintiff in error. 1. The whole proceedings in this case are null and void, because not instituted in the name of the corporation, as required by the charter, but in that of the agent of the corporation. 2. The order appointing the second viewers was illegal, in directing them to assess the damages *done* to Morton's land, not the damages that *will be done*, as required by the charter. 3. The report of the second viewers is irregular and illegal on its face, in this, that it did not appear that they ever became qualified to act by taking and subscribing the statutory oath. 4. The judgment entered by the clerk in vacation upon the report of the second viewers was in direct violation of the statute. 5. The statute allows but one review of the evidence touching the extent of the damages; but if the proceedings of the viewers are irregular or illegal, and this appears upon the face of their report, it should be set aside.

Richmond, for defendant in error. All the requisitions of the charter were substantially complied with. The report of the viewers, though subject to a verbal criticism, shows on its face that they had in contemplation all the damage Morton

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would sustain on account of the location and construction of the road through his property. Any informalities in the early stages of the proceeding were waived by the appearance and objections of Morton.

RYLAND, Judge, delivered the opinion of the court.

This was a proceeding by the Hannibal and St. Joseph Railroad Company to have the said road laid out through the lands of the defendant, Samuel Morton, and to have viewers appointed to assess the damages, if any, which the construction of the road will do to the lands of said Morton. This proceeding was under the charter of said railroad company. This company was incorporated by the legislature in 1847. By its charter, the company has power "to view, lay out and construct a railroad from St. Joseph to Palmyra, thence to Hannibal; and shall, in all things, be subjected to the same restrictions and entitled to all the privileges, rights and immunities which were granted to the Louisiana and Columbia railroad company by an act entitled "An act to incorporate the Louisiana and Columbia railroad company, passed at the session of the general assembly in 1836 and '37, approved January 27, 1837."

The 8th and 9th sections of this last act are as follows:

§8. In all cases where any person through whose lands said road or any branch thereof may run, shall refuse to relinquish the quantity aforesaid, or when no contract can be made with the owner thereof, either on account of the absence of such owner, or being an infant, or of unsound mind, or a married woman, or from any other cause whatever, it shall be lawful for the company to give notice thereof to the *judge* of the circuit court within which the lands lie; and it shall be the duty of the *judge* thereupon to appoint three discreet, disinterested men, citizens of the county, to examine and view said lands, upon a day to be given by said viewers designated. At least ten days' notice of the time of making said view, shall be given to the owner of such lands, if a resident of the county; if a non-re-

sident of the county, notice shall be served upon the tenant residing on the land ; and if the owner is a non-resident of the county and no tenant is residing on the land, notice shall be given by an advertisement in some newspaper in or nearest to the county in which the lands lie. In the case of any lands belonging to any married woman, notice shall be served upon her husband. In the case of infants, or persons of unsound mind, notice shall be served on the guardian of such infant or persons of unsound mind ; and where there is no guardian of such persons, the *judge* shall appoint some suitable person to act in their behalf.

§9. The viewers appointed by this act shall, severally, before entering upon the duties of their appointment, take and subscribe an oath, faithfully and impartially to discharge the duties of their appointment, and particularly to honestly assess the damages, if any there are, which the construction of the road will do to the lands of such owner, taking into their estimate the advantages as well as the disadvantages the said road may be to be the same. It shall be the duty of said viewers to go upon the said lands and examine the same, and report what damages, if any, will be done to said lands or any building or appurtenance thereon ; which report shall be accompanied with a plat of the land viewed and returned into the office of the clerk of the circuit court of the county ; and the clerk shall file the same and enter judgment on the record of the court for the amount thereof, which shall be final and conclusive between the parties, unless they shall file in writing with the clerk, within five days after the making of the view, their objections to the same ; and whenever any objections shall be thus filed, it shall be the duty of the judge to examine the same, as soon thereafter as may be, either in vacation or term time, and may hear testimony thereon, and if the judge shall find the objections sufficient and legal, he shall order a review by three other viewers, who shall proceed in the same manner as hereinbefore provided ; but not more than one review shall be granted to the same person ; and if the judge shall find said objections not to be just or sufficient,

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he shall direct judgment to be entered according to the report. In all cases, the clerk shall not enter judgment until the five days for filing objections shall have passed.

These are the provisions of the charter which allow the proceedings in this case. Here the circuit judge appointed viewers; they make their report; the party owning the land, Samuel Morton, files his objections to the report; the circuit judge, upon examination of the objections, sets aside the report, and appoints a new set of viewers; they make their report; Samuel Morton again files his objections to this second report with the clerk of the circuit court, and moves for leave to introduce proof in regard to the assessment of damages. His motion and objections to the report are overruled, and the clerk enters the judgment for \$150, in favor of Morton, against the company. Samuel Morton, having excepted to the acts of the judge and clerk, brings the case here by writ of error.

1. In the opinion of this court, a writ of error will not lie in this case. This whole proceeding is of the nature of proceedings *in pais*. These acts are not done by a court; no judgments of a court are required to be given or rendered in such proceedings. The judge and not the circuit court is to act. He may act in his chambers. The clerk is to act, and not merely to record the proceedings of the court; and what these persons may do was, in contemplation of the law makers, final in certain events. The general rule is, that a writ of error will lie only on a final judgment, or an award in the nature of a judgment, given in a court of record, acting according to the course of the common law. In England, it is well settled, that error does not lie when the court acts in a summary manner, or in a new course, different from the common law. Now, in this case before us, there is no act of any court. It is a summary proceeding before a judge in vacation, and under a special authority by statute, in which the intention is obvious that the acts of the judge should be final.

It has been held in New York, that a writ of error does not lie upon the refusal of the Supreme Court to set aside the de-

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cision of trustees under the statute relative to absconding debtors, upon an allegation of error in the adjustment of the demands due the creditors of the absconding debtor, although the statutes of New York declare writs of error to be writs of right, as well upon a *determination*, as upon a final judgment in civil cases. 2 Rev. Stat. 591, §1. 10 Wend. Rep. 34.

In Connecticut, it was held that, though under the charter of the Hartford and New Haven railroad company, the quantity of land taken for the road must be designated, so that the freeholders may know what to appraise before the damages can be legally assessed, yet the charter does not require the width of the road to be determined before the route is approved by the commissioners, and the freeholders to assess the damages are appointed. The appointment of freeholders to assess the damages, in such a case, is not the subject of revision by writ of error. 13 Conn. Rep. 110.

Upon the whole, then, this court is of opinion, that the writ of error will not lie in this case. The same is accordingly dismissed; the other judges concurring.

WADE, Appellant, vs. JONES, Respondent.

1. A man may be the "head of a family," within the meaning of the execution exemption act, though he has neither wife nor children.
2. A widowed sister keeping house for her brother, is a "member of his family," upon whom process may be served.

Appeal from Lincoln Circuit Court.

This was an action begun by Wade, to recover the value of personal property, consisting of a negro woman, two cows and their calves, and a lot of bacon and other articles, alleged to have been wrongfully taken by Jones, the defendant. Jones answered that he took the property as constable, under an execution issued by a justice of the peace, and directed to him.

The cause was submitted to the court upon an agreed statement of facts, which was substantially as follows :

The property was levied upon and sold under a regular execution, directed to the defendant. At the time of the levy, plaintiff was living on and cultivating a rented piece of ground. He had no wife nor child. His widowed sister, with four small children, lived with him and kept house for him, having no other home. He supported her and her children. The property levied upon did not exceed the value of eighty-seven dollars, and plaintiff had no other property to exceed the value of ten dollars.

Upon these facts the court below gave judgment for the defendant, and the plaintiff appealed.

J. O. Broadhead, for appellant. There is no reason, to be drawn either from the language or the policy of the law, why the words "head of a family" should be applied only to the father or husband. A family is a collection of individuals, having a common head. (1 Burrill's Law Dic. p. 470.) This common head may be a father or brother or any other near relative to whom, by the customs of society, the weak and helpless, whether women or children, may look for protection. (2 Bur. Law Dic. p. 785.) The members of the family do not consist merely of those whom the head of the family is under some legal obligation to protect. A father, who has living with him a family of grown daughters, is certainly the "head of a family," and yet he is under no legal obligation to support them. (See also Lambert on Dower, p. 11.)

E. Hunt and *W. Porter*, for respondent. The "family" contemplated by the act is that only which grows out of the marriage relations — which constitutes a legal charge on its head. It was the better to enable the husband and father (or mother, if the father be dead or absent,) to discharge these legal obligations, that our legislature enacted these exempting acts. Plaintiff was not the head of his sister's family; she was the head of her own family; she was the natural guardian of her children, and had the right to direct and control them,

until otherwise directed by a court of competent authority. She did not, by living with plaintiff, lose any of her legal rights and privileges. If an execution had been levied on her property, she could, as head of her little family, have claimed an exemption of it from sale. Her family was not broken up and separated from her, but was living with her, and the fact of her not occupying her own house did not deprive her of her rights as head of her own family. (*Woodward v. Murray*, 18 J. R. 400.) If her family exempted her own property from sale, surely the same family could not exempt the property of the plaintiff.

RYLAND, Judge, delivered the opinion of the court.

1. We have no doubt, from the above agreed statement of facts, that the plaintiff comes within the meaning of the phrase "head of a family," and that he should have been so considered by the court below.

The Supreme Court of Tennessee, in 1842, in the case of *Bachman v. Crawford*, (3 Humph. 216,) held the following language: "When a man controls, supervises and manages the affairs about a house, he is, in the largest sense, the head of the family, and all who reside in the house are members of the family. But it may be a large boarding establishment, in which half a dozen distinct families reside. We do not suppose that these families lose their character as such, because they reside under another man's roof, and feed at a common table. So two families, with equal rights and claims, may reside together, and although thus associated, they all constitute, in a large sense, one family; still the father or mother, as the case may be, exercising a distinct control over the children and servants belonging to them, constitutes each a distinct family, and the manager of each, a 'head of a family.'"

In the case of *Bachman v. Crawford*, (3 Humph. 216,) the court below charged the jury, "that if the plaintiff had children, who were living with her at the time the levy was

made, although she resided in the same house with her father, and although he might claim and exercise absolute dominion and control over the house and farm, still the plaintiff being the mother of children residing with her, would, within the meaning of the statute, be considered as the head of her own family, and within the exemption of the statute, and that there might be two families residing together, in the same house, and occupying the same apartments." This charge was held correct by the Supreme Court.

In the case of *Sallee v. Waters*, (17 Ala. Rep. 486,) the jury found, "that Curtis had one child dependent on him for a support; but that he had no wife, nor did he keep house; but he and his child boarded at different houses, in the town of Greenville." The court said upon this question, as to Curtis being the head of a family, from these facts found by the jury, "we think it clear that he was." But in the same case, the court said, to constitute a family, within the meaning of the act (exempting property from execution,) the relation of parent and child, or that of husband and wife, must exist; there must be a condition of dependence on one or the other of these relations; but it is not necessary that all the defendants should live under the same roof, or that the family should live together; it is the relation, and the dependence on that relation, and not the aggregation of the individuals, that constitutes a family."

In our opinion, it is not necessary that the relation of husband and wife, or father and child, or mother and child, should exist in every case, to constitute a family. The man who controls, supervises and manages the affairs about the house, is the head of a family, and such a man need not necessarily be a husband or a father. Much more does such a man assume the station and rank and responsibilities of the head of a family, than a father only, who has but one child, no wife, keeps no house, but boards out himself with one family, his child boarding with another family in the same village.

Here the brother, the plaintiff, had his widowed sister and

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her children living with him ; he was keeping house and cultivating a small piece of ground, and provided for and supported his sister and her four small children ; the sister kept house for him. He must be considered as the controller, manager and supervisor about the house, and the head of the family.

2. Our law prescribes the mode in which defendants shall be served with the process issuing on petitions. The third and last method prescribed is as follows : " or thirdly, by leaving such copy at the usual place of abode of the defendant, with some white person of his family, above the age of fifteen years."

Suppose this plaintiff had been sued himself, and the sheriff had served the process by leaving a copy thereof with the defendant's sister, Mrs. Carter, at his usual place of abode, and stating she was a member of his family, and a white person over the age of fifteen years ; could there be a doubt about the legality of such service ? Could the defendant have convinced the court, from the facts agreed to in this record, that he had no family, and consequently the service was not sufficient ? Clearly not. Then, if he has a family sufficient for this purpose, the same must serve him for other purposes.

We have no doubt the facts agreed to constitute this plaintiff " the head of a family," in the meaning and contemplation of the act, and therefore that the court below erred in declaring the law for the defendant.

The judgment is, with the concurrence of the other judges, reversed, and the case remanded for further proceedings, in accordance with the views expressed herein.

JAMES & JEWETT, Respondents, *vs.* DIXON, Appellant.

1. An injunction does not lie to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable.

James v. Dixon.

Appeal from Jefferson Circuit Court.

This was a petition for an injunction to restrain Dixon from selling and shipping wood on and from the "Selma landing," to which the petitioners claimed an exclusive right for that purpose. The petition alleged that the defendants were utterly insolvent.

At the hearing, the court found the following facts: On or about January 23, 1850, Dixon and Skeel entered into a partnership in the business of cutting cord wood and selling it to steamboats on the Mississippi river, and for that purpose took a lease from the owner of the Selma landing, which gave them the exclusive privilege of selling wood on said landing until November 5, 1854. Dixon & Skeel continued to cut and sell wood, as partners, until October, 1851, when Skeel died. Letters of administration were taken out on his estate. After the refusal of the surviving partner to administer upon the partnership effects, the administrator took them into possession, and sold the unexpired term of the lease in question at public auction, having first given notice, and the plaintiffs became the purchasers, and received a bill of sale. At the time of the sale, arrears of rent were due to the owner, which had been allowed against Skeel's estate. After the purchase by plaintiffs, defendant continued to sell wood upon the landing upon his own separate account, and refused to surrender it to the plaintiffs or to account with them.

Upon these facts, the court declared that the plaintiffs were entitled to the exclusive enjoyment of the franchise, and granted a perpetual injunction, and gave judgment for the possession.

Noell and Pipkin, for appellant, contended that the lease was not partnership property, and could not be sold as such by Skeel's administrator.

Frissell and Jones, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The only circumstance that could have warranted an injunction in this cause, was the alleged insolvency of the defendant.

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As that fact was not found by the court, there was no ground for an injunction. An action in the nature of an action on the case (as the property affected was incorporeal) would have afforded ample redress to the plaintiffs. The case, stripped of the allegation of insolvency, furnished no ground whatever for an injunction. An injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate; but is susceptible of perfect pecuniary compensation, and for which a party can obtain adequate satisfaction in the ordinary course of law. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle a party to the interference by injunction. It is obvious that, in the present case, all the damages which have been sustained by the plaintiffs, could be redressed in an ordinary action for damages.

Upon the evidence set out in the motion for a review of the facts found by the court, there should have been a new trial granted. The judgment will be reversed, and the cause remanded; the other judges concurring.

FARRAR *et al.*, Appellants, vs. PATTON, Respondent.

1. It is optional with a party who has made a parol contract to convey land to avail himself of the plea of the statute of frauds or not. (*McGowen v. West*, 7 Mo. Rep. 570, affirmed.)
2. A conveyance of all the grantor's "right, title and interest" in a tract of land to which he had the legal title, but which he had previously made a parol contract to convey to his father, since deceased, *was held* to pass only his interest as *heir* of his father.
3. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds.
4. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought to be enforced.

Appeal from Franklin Circuit Court.

In 1830, Leonard Farrar and Richard, his son, agreed to exchange tracts of land owned by them respectively. Leonard conveyed immediately to Richard, but Richard did not convey to Leonard, the latter desiring him to wait until he sold the land, and then convey directly to the purchaser. In 1836, Leonard died without having received a conveyance from his son. By his last will, he devised all his real estate to his three eldest sons, John S., Richard and Perrin, and appointed them his executors. In the inventory of Leonard Farrar's estate, subscribed and sworn to by Richard and the other executors, the land which Richard had contracted to convey to Leonard was put down, accompanied by a statement that Richard was bound by contract to convey it. On the 17th of April, 1845, pending a proceeding to vacate the will of Leonard Farrar, Richard "granted, bargained and quit-claimed" to William N. Patton, and his heirs and assigns forever, all his "right, title, claim, interest and demand, both at law and in equity, as well in possession as expectancy, of, in and to" the same land. At the time of conveying to Patton, Richard notified him of the contract he had made to convey to his father. Patton also received from John S. Farrar a deed for his interest in the land. The present proceeding was begun by the minor children of Perrin Farrar, the other devisee of Leonard Farrar, to enforce a specific performance of the contract made by Richard Farrar to convey to their grand-father, and for a partition. They claimed one third of the land in right of their deceased father, and admitted that the title to the other two thirds was in Patton. Patton claimed the whole of it under his deed from Richard Farrar, who held the legal title when the deed was executed.

The court below declared that the contract was void by the statute of frauds, and that the recital of the contract in the inventory signed by Richard Farrar, was not a sufficient memorandum in writing to take it out of the statute, because the terms

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of the contract were not stated, nor the consideration ; and refused the relief asked by plaintiffs. They appealed to this court.

W. V. N. Bay, for appellants. 1. Payment of purchase money is such a part performance of a parol contract for the sale of lands as will entitle the purchaser to a decree for a specific execution of the contract. (3 Atk. 4. 3 Vesey, 37. 4 ib. 720. 7 ib. 346. 2 Day, 225. 5 ib. 67. 1 Bacon's Ab. 162. 1 Powell on Contracts, 307. 1 Madd. Ch. 377. Roberts on Frauds, ch. 3, 142-3-4, 152. 15 Mass. 89. 1 Peters' C. C. R. 388. 1 Harr. 540. *Wetmore v. White*, 2 Caines' Cases in Error.) 2. Although a parol contract for the sale of land is void by the statute of frauds, yet it is well settled in chancery that, if such contract has been performed on one part, an equity arises from that source, independent of the statute, to compel a performance on the other. (5 Day, 67. 1 Madd. Ch. 377. 1 Fonblanque, 181-2-5. 1 Vesey, 221, 297. 1 Serg. & Raw. 80. 2 Johns. R. 221, 573, 578. 5 Day, 16. 14 Johns. Rep. 15.) 3. A person who takes a conveyance of land, with notice of the legal or equitable title of another to the same land, will be held a trustee for the benefit of the other. (6 Mo. Rep. 605.) 4. The memorandum in the inventory of Leonard Farrar's estate, signed by Richard Farrar, is a sufficient compliance with the statute. 5. Patton, being guilty of a fraud, in accepting a conveyance with a knowledge of the equitable title of plaintiffs, cannot now avail himself of the statute of frauds.

C. Jones, for respondent. 1. The memorandum of the contract in the inventory, without any explanation of its terms, was not sufficient to take it out of the statute. (1 Johns. Ch. R. 273. 9 Mo. 566. 3 Johns. R. 399. 4 Bos. & Pul. 252. 5 B. & C. 583. Adams on Equity, p. 87. 2 Story's Eq. 64, *et seq.* 4 Greenleaf's Cruise, ch. 3. 2 Kent, 510-11.)

SCOTT, Judge, delivered the opinion of the court.

Richard Farrar, as one of the devisees of his father, had an interest in the land in controversy, at the time of his con-

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veyance to Patton. By his deed to Patton, he did not convey the tract of land itself, but only all his right, title, claim, interest and demand, both in law and equity, therein. These words are only effectual to convey that which a man may lawfully convey. The interest that R. Farrar possessed under his father's will was a subject on which his deed could operate, without affecting the land he exchanged with his father. Although the contract for an exchange was a parol one, yet it was not void. Richard Farrar could avail himself of the plea of the statute of frauds or not, as he pleased. (*Dawson v. Ellis*, 1 Jac. & Wal. 503. *McGowen v. West*, 7 Mo. Rep. 570.) His conduct showed that he regarded the contract as binding on him. In the inventory which he returned, he recognized it as obligatory, and this fact was communicated to Patton. Now, as the words of the deed are only effective to pass that which Farrar may lawfully convey, and as they can have effect without passing the land subject to the contract for an exchange, there is no reason why the deed should receive such a construction as would make Farrar guilty of fraud, when no such thing was intended. Had Farrar conveyed the tract of land itself, then it would have appeared that he insisted on the invalidity of the contract, but the terms employed are consistent with the idea that he only conveyed what he lawfully might.

But there is another ground on which the plaintiffs are entitled to the relief prayed, even though the land, the subject of the contract of exchange, passed by Richard Farrar's deed. From the evidence, it is clear that Patton purchased with notice of the agreement. Being affected with notice, he is not a purchaser in good faith. Such being the case, he stands precisely in the situation that Richard Farrar would have occupied, had the suit been brought against him. It is a rule in equity that, when one party to a contract has been placed in such a situation by a total or partial performance, that it would be a fraud on him if the contract was not fully executed, then equity will interfere, notwithstanding the statute. Leonard Farrar, in pursuance to the contract of exchange, executed and delivered a

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deed, thereby fulfilling his part of the agreement. In what a situation will he and his heirs be, if the other party is not compelled to perform his part of the agreement. Surely a fraud will have been committed on them, and they will be without redress unless a court of equity interferes. Leonard Farrar could not recover the land he had conveyed in an action of ejectment. His deed would be against him. He could only have relief in equity, and that, too, on the ground of fraud. Now it is an established principle, that a statute which was made to prevent frauds, shall not receive such a construction as will protect them. As the terms of the contract plainly appear by a written acknowledgment of R. Farrar, we see no difficulty in granting the relief sought by the plaintiffs.

The other judges concurring, the judgment will be reversed, and the cause remanded.

PARKE & BARRON, Appellants, vs. LEEWRIGHT, Respondent.

1. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land.
2. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be.

Appeal from Franklin Circuit Court.

The case is stated in the opinion of the court.

Stevenson and Gale, for appellant.

J. Halligan, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

The petition is for the specific execution of an agreement for the sale of land. It is alleged that the plaintiffs agreed with one Jones, an agent of defendant, to purchase 273 acres of land belonging to defendant, at \$7 50 per acre. The plaintiffs were

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to pay twenty dollars in cash and cause certain notes of the defendant to be liquidated, and to pay the balance of the purchase money in two years, for which they were to give their bonds, bearing interest from date. The plaintiffs and defendants were to meet in Union, the county seat of the county, and execute the necessary papers under the contract. The agreement was made on the 24th December, 1852, and the parties were to meet and execute the contract on the first day of January, being eight days after making the contract.

The plaintiffs allege that they paid to Jones the twenty dollars in cash, when the contract was made, and immediately took possession of the land; that they attended at Union on the first day of January, ready to comply with their part of the contract, but the defendant failed to attend and refused to comply with his part of the contract. They also say that they proceeded to improve and work the land, and that they have constructed "valuable and lasting improvements upon the land, in building fences, stopping washes, and preparation of the land for cultivation." The defendant demurred to the petition, and the court sustained the demurrer.

The suit was commenced March 11, 1853. The only ground upon which this agreement is to be taken out of the operation of the statute of frauds is, that it was partly performed.

1. The purchase money agreed upon was \$2,053 12½; the payment was twenty dollars. The payment of this sum did not, of itself, entitle the plaintiffs to apply to a court of equity for a specific execution of the agreement. Their remedy at law afforded them ample redress. They took possession immediately upon making the agreement. If it was on the same day, then in eight days they knew that the defendant refused to comply with the contract. The *valuable* improvements, in making fences, stopping washes, &c., were not made within that time—at least it is not so alleged—and if they were made afterwards, they were made upon the supposition that the plaintiffs could hold the defendant to the terms of the agreement, by this suit—not that he would himself execute the contract. They

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will not be placed in a condition which will be a fraud upon them, if the agreement is not executed.

The petition, on its own face, shows a case in which plaintiffs are seeking to hold the opposite party to the fulfillment of an agreement void by the statute of frauds, when nothing has been done under it, on their part, with the expectation that it would be fulfilled by defendant, except the payment of the twenty dollars. In such a case, a court of equity does not interfere.

The demurrer was rightly sustained, and the judgment is affirmed.

JONES, Appellant, vs. BRINKER, Respondent.

1. The allowances made to administrators in their annual and final settlements have the effect of judgments, and are conclusive between the parties at law; but may be set aside in equity upon a proper showing.
2. A party seeking equitable relief under the new system of practice must state facts which would have been a ground for such relief under the old system.
3. A statement that the administrator *illegally* procured allowances in his favor does not make out a case for equitable relief.

Appeal from Washington Circuit Court.

The case is sufficiently stated in the opinion of the court.

Frissell & Perryman, for appellant.

C. Jones, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was a suit brought by the plaintiff, Jones, against Fanny Brinker and John B. Brinker and others, upon the bond of said Brinkers and others, as administrators of the estate of Abram Brinker, deceased. The plaintiff alleges various breaches of the condition of the bond in his petition. The defendants demur to some of these breaches, and answer as to others. The court sustained the demurrer as to some of the breaches as-

signed; thereupon the plaintiff withdrew his petition and all other breaches except those demurred to, and to which the demurrer had been sustained; suffered judgment to be rendered against him and brings the case here by appeal. The breaches to which the demurrer had been sustained allege and charge that the administrators had obtained credit in their various settlements with the county court for *illegal* charges against the estate, amounting to \$630 11; then specifies the settlements and the items of illegal charge.

1. The question arising here involves the effect of allowances made to administrators by the county court in their annual and final settlements. These allowances and settlements have the effect of judgments, and are considered as conclusive between the parties interested and concerned therein, at law. But it is allowed to a party interested, to file his bill in chancery against the administrator, charging him with having made false and fraudulent accounts, and having fraudulently procured allowances in his favor to be made to him by the county court. Such a proceeding is not based upon the administrator's bond; nor is it necessary to make his securities in the administration bond parties to it. The complainant attacks the settlements and allowances of the administrator, as having been procured by false and fraudulent means. Should he overhaul them, have them set aside for such fraud, and declared of no validity, then he may resort to his action on the bond of the administrator, without the fear of being met by such settlements, allowances and judgments.

2. Since we have now no chancery courts, and the distinction between courts of equity and courts of law has been abolished, the party seeking to falsify the allowances and accounts of the settlements of administrators, must, nevertheless, petition the circuit court, as a court of law and equity, for that purpose; and his petition must allege the same grounds now for the action and interference of the circuit court, as was formerly necessary to give the court of chancery jurisdiction.

3. It was never held that charging merely that the adminis-

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trator had obtained *illegal* allowances in his favor, in his settlements made with the county court, was ground for applying to the chancery court to have such allowances set aside and vacated. He must charge that the allowances were procured by fraudulent and false means and pretences, unjustly, to the injury of the estate and parties interested.

In this case, the petition does not set forth and contain such facts as will authorize the court to set aside the allowances to the administrator. The demurrer was therefore properly sustained by the court below, and its judgment will be affirmed; the other judges concurring.

BOLLINGER *et al.*, Appellants, *vs.* CHOUTEAU *et al.*, Respondents.

1. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void.
2. An adverse possession by a mortgagee, under the statute of limitations, to be a defence against a suit brought by the mortgagor to redeem, must at least be an *actual* possession. Payment of taxes on wild land is not sufficient.
3. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity.
4. A mortgagee in possession, upon a bill by the mortgagor to redeem, will be allowed for all permanent and useful improvements, deducting rents and profits, and for all taxes paid.

Appeal from Jefferson Circuit Court.

The case is stated in the opinion of the court. It was orally argued by Mr. Noell and Mr. Fox, for appellants, and Mr. Polk and Mr. Whittelsey, for respondents.

Noell and *Fox*, for appellants, made the following points:

1. The proceedings of foreclosure set up by defendants as a bar to the redemption demanded by plaintiffs were void, because Jacob Bollinger, who was made defendant, was then dead, and the suit should have been instituted against his heirs. (Act of 1807, tit. Mortgage. *Russell v. Mullanphy's heirs*, 4 Mo. Rep. 329-30. 2 Summer's C. C. R. 401.

12 Mo. Rep. 603.) 2. The right to redeem in this case was not barred by limitation or lapse of time, there being no actual possession of the mortgaged premises until 1837. (*Moore v. Cable*, 1 Johns. Ch. Cases, 385. 2 Cruise's Dig. 140. 2 Vernon, 377. 5 Brown's Par. Cases, 307.) 3. The only acts of ownership shown by the defendants prior to 1836, were the redemption of the land from the state to which it had been forfeited for taxes, and this act was not inconsistent with the character of mortgagees. As mortgagees, they were interested in seeing that their security was not lost. (*Wells v. Morse*, 2 Vern. 9. *Dexter v. Arnold*, 3 Sumner, 152. 9 Dana, 235. 3 Sumner, 476. *Morgan v. Morgan*, 10 Georgia, 297.)

Polk and *Whittelsey*, for respondents, relied upon the following, among other points: 1. The statute of limitations must be considered as having run against the claim asserted by the plaintiffs. Chouteau and Soulard, after the foreclosure in 1821, paid taxes on the land, and exercised all the possession over it that is usually exercised over wild land. It does not appear that the heirs of Jacob Bollinger were minors, or laboring under any disability at the time of his death. (*Hughes v. Edwards*, 9 Wheat. 489. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129. *Slee v. Manhattan Co.* 1 Paige's Ch. Rep. 148. *Fenwick v. Macy*, 1 Dana, 279. 14 Mo. Rep. 437. 17 Serg. & Raw. 350. 7 Watts, 565, 580. 3 Watts, 69. 10 Serg. & R. 306. 1 S. & R. 111. 2 S. & R. 436. 7 Watts, 35. 11 Peters, 41. 6 Peters, 513. 10 Peters, 442. 2 S. & R. 436.) 2. The plaintiffs' claim is antiquated and stale, and ought not to be entertained. (2 Story's Eq. p. 503, §529. 1 Fonblanque, ch. 4, §27, and notes. *Craig v. Perry*, 3 Mo. 516. 10 Pet. 177-225. *Smith v. Clay*, 3 Bro. Ch. Rep. 640. 2 Jac. & Walk. 141. 2 Younge & Coll. 662-678-81. 2 Sch. & Lef. 637.) 3. Under the facts and circumstances of this case, it would be inequitable to allow the representatives of the mortgagor to redeem. (*Powell on Mort.* (3d ed.) p. 136, 143. Cowp. Rep. 601. 1 Rep. in

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Ch. 170. 1 Vern. 244. 3 Salk. 84. *Meyer v. Campbell*, 12 Mo. 603. 1 Story's Eq. 75. 18 J. R. 144, 288, 544. 10 Peters, 177. 6 Wheaton, 541. 1 Dessaus. 160. 2 Dessaus. 582.) 4. The judgment of foreclosure in favor of Chouteau and Soulard was not void, but at most only voidable, and cannot be objected to collaterally in this suit. The fact that Bollinger was dead does not render it void, because it was a proceeding in *rem*. (See 1 Terr. Laws, 182. *Downing v. Palmater*, 1 Monroe, 66. *McNair v. O'Fallon*, 8 Mo. Rep. 188, 204. 2 Hare & W. Lead. Cases, 734, 737. 12 Mo. Rep. 238. 16 Mo. Rep. 173. 4 Watts, 278. 16 Mo. Rep. 331. 11 Mo. Rep. 295.)

RYLAND, Judge, delivered the opinion of the court.

This is a petition by the heirs of Jacob Bollinger to be permitted to redeem a tract of land purchased by their ancestor of Chouteau and Soulard, and for which said Chouteau and Soulard executed their deed to said Jacob Bollinger; and afterwards, on the same day, the said Bollinger, having given his notes for the purchase money, executed the mortgage in question on the same land, in order to secure the payment of the purchase money to the said grantors, Chouteau and Soulard. The purchase was made and deed executed, and mortgage and notes given in March, 1817. The notes falling due at different times according to the stipulated credit given, and none of the money being paid, the said Chouteau and Soulard filed their petition in the Circuit Court of Jefferson county, on the 21st August, 1821, to foreclose the mortgage and to have the land sold to pay the debt. The sheriff returned that the defendant was not found. At the April term, 1822, of said court, an order of publication was made. At the August term, it appearing that publication had been duly made, a judgment by default was entered, and the court ordered a sale of the mortgaged premises.

This order was renewed at the December term, 1823, and

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the land was sold by the sheriff in January, 1824; Chouteau and Soulard became the purchasers for some two hundred and ten dollars.

The facts agreed upon the record show that said Jacob Bollinger was dead at the commencement of the suit to foreclose the mortgage, and that letters of administration were granted on his estate in Cape Girardeau county, in October, 1818; that said Jacob Bollinger resided in Cape Girardeau county previously to his death.

The court below found that the proceedings to foreclose the mortgage by Chouteau and Soulard were in good faith; that, after the purchase by said Chouteau and Soulard, one Cowen, in 1831, claiming to have purchased one half of said land from Chouteau, made a survey of the exterior lines of the tract and run a centre line for the purpose of dividing said land; that, from the year 1826, the said land was assessed in the name of Chouteau and Soulard, and that they and their representatives paid the taxes on said land at Jefferson City until 1836, when said land was subdivided and sold in partition. Since the year 1837, the land has been in the actual occupation of the defendants, who are now in possession, claiming title to the same, in good faith, and without notice of the death of said Jacob Bollinger or of any claim by his heirs. The defendants have made, under their title, on said land, valuable improvements, amounting to \$30,000 or \$35,000. The court finds that Jacob Bollinger never had actual possession; that, at the date of the sale, in 1817, the land was of no greater value than the sum mentioned in the mortgage, \$14,929 92; that, by means of the improvements and growth of the country, said land has risen in the last few years greatly in value.

Upon this finding, the court held that the plaintiffs were not entitled to redeem. Although the judgment of foreclosure mentioned may be declared wholly void and irregular, having been obtained without notice, yet, upon the lapse of thirty-six years since the execution of the mortgage, no part of the purchase money having been paid, and the property, in consequence of

the growth of the country, and the valuable improvements put thereon by the persons now in possession, having greatly increased in value, the court below considered it unjust and inequitable to allow redemption, and rendered judgment for defendants.

The plaintiffs made the necessary motions for a review of the finding of the facts, as well as for a review of the declarations of the law arising thereon, which being overruled and excepted to, they bring the case here by appeal.

1. Two points present themselves by this statement of the facts which will require the consideration of this court. The first is, in regard to the proceedings to foreclose the mortgage by Chouteau and Soulard in 1821. In the opinion of this court, there can be no doubt as to the irregularity of these proceedings. Jacob Bollinger, against whom the proceedings were commenced, was dead some years before the plaintiffs filed their petition. Administration had been granted upon his estate in Cape Girardeau county, where he had resided in 1818. The summons issued against him alone, not against his heirs. This whole proceeding then was irregular. The judgment is consequently void. Indeed, the court below considered this judgment void, and argumentatively found it to be so. A suit brought against a dead man will not authorize the court to render judgment against him. The plaintiffs in that petition should have brought the action against the heirs of the mortgagor. Then, however the proceedings to foreclose the mortgage by Chouteau and Soulard may have been relied on in this case, and however far they may have had any influence on the judgment of the court below, they are now unavailing, and they will, in this court, be entirely disregarded and laid out of our consideration. They can have no effect, and are entitled to no weight in the adjudication of this case.

2. These proceedings laid aside, then how stands the case? The heirs of a mortgagor file their petition for leave to redeem the mortgaged property; for leave to redeem the property of a mortgage still open and unexpired. They are met with the

defence of the statute of limitations, and the staleness of their claim. So far as regards the statute of limitations, the question presents but little difficulty. This statute can be brought to the aid of the actual possessor only. It begins to run from such actual possession, and though it has been invoked in behalf of those who claim title to wild and unimproved lands, without actual occupation, yet the courts have invariably declared it cannot help in such cases. In the case of *Gordon et al. v. Hobart et al.*, Mr. Justice Story, in delivering the opinion of the court, said: "It may be proper, before closing this opinion, to notice another objection to the plaintiff's right to redeem any of the mortgaged premises, and that is, at the time of the deed of conveyance to Jesse Gordon, in 1832, by Thackara, (which is the foundation of the plaintiff's title,) the defendants held the premises under an adverse possession, and consequently, that that deed was inoperative. The only answer necessary to be made to this objection is, that the possession was that of a mortgagee, and that the latter can never be permitted, in a court of equity, to set up any adverse possession to bar the title of his mortgagor or purchasers under him, to redeem, unless that possession has been for twenty years, and thus has constituted an equitable bar from lapse of time." (2 Sum. Rep. 408.)

In *Moore v. Cable*, (1 Johns. Ch. Rep. 386-7,) Chancellor Kent said: "Nor will a mere constructive possession for twenty years be sufficient. The courts require an actual possession by the mortgagee during the period that is to form the equitable bar; for, as they adopt the rule by analogy to the statute of limitations, it requires the same actual and continued possession to form a bar in equity that is requisite to form a bar at law. The idea suggested by the counsel for the defendant that, as the mortgaged premises were probably wild, uncleared lands, possession is to be deemed to have followed the right, and to have been in the mortgagee after default of payment, is not applicable to this case. That fiction was adopted by the courts to preserve the lands of the true owner, while in

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their uncultivated state, from intrusion and trespass; and it would be a perversion of the rule, to make it operate by way of extinguishment of a right. Nothing short of actual possession for twenty years, will, at law, toll the entry of the true owner; and the equity of redemption, which, in this court, is the same as the fee at law, ought to be equally protected."

The actual possession here did not begin until some time in 1836 or '37, not twenty years before this proceeding to redeem was commenced. There is no doubt as to the utter inability of the defendants to protect themselves either at law or in equity, by the length of their possession, in this case. The payment of taxes will not do. This, after proof of actual possession, might be a strong circumstance to show the continued claim of the defendants; but here there is no possession by Chouteau and Soulard, or either of them, or any one claiming under them, until 1836 or 1837.

3. The staleness of a claim will not prove a valid defence, when the facts by which it exists would not afford a bar in equity. In *Proctor et al. v. Cowper*, (2 Vernon, 376,) a bill to redeem a mortgage made in 1642, fifty-eight years before, was allowed, and a redemption decreed. Here were three descents on the defendant's part, and four on the plaintiffs', the length of time being answered, for the greatest part, by infancy and coverture, and because a bill was brought by the mortgagee in 1686, to foreclose. This was done in the year 1700.

This case presents great hardship on the part of the defendants, and it would have afforded this court a gratification to have been able, legally, to protect them and secure them in their homes. But the law is with the plaintiffs, and we have nothing to do but to declare it. It has been said by an eminent judge, that "hard cases are the quicksands of the law."

4. The judgment below must be reversed, the case remanded, and that court is directed to permit the plaintiffs to redeem; but they are to allow compensation to the defendants for all permanent and useful improvements, deducting the rents and profits received by the defendants; the payment of the purchase

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money and interest thereon must first be made, and the re-payment to them of the taxes. The purchase money and interest to be paid by a specified day; otherwise the petition to redeem to be denied, and the mortgage to stand as foreclosed. The other judges concur herein.

CHAMBERLIN & CHURCHILL, Respondents, vs. THE MAMMOTH MINING COMPANY, Appellant.

1. The president is the proper party upon whom to serve process against a corporation, and may appear and confess a judgment for the corporation.
2. The statutory provision (R. C. 1845) that confessions of judgments before justices of the peace shall be in writing, by its express terms, does not extend to confessions in actions commenced by process.

Appeal from Jefferson Circuit Court.

This was a motion to quash an execution in favor of the respondents against the Mammoth Mining Company, issued from the Circuit Court upon a transcript of a judgment recovered before a justice of the peace. At the trial, the transcript was read in evidence, in which the title of the cause was stated as follows: "Frederick B. Chamberlin "Co." & Levi Churchill, Thomas Felch, agent in Jefferson county, Mo., vs. The Mammoth Mining Co., by J. V. Redding." The justice testified that the word "Co.," which appeared upon the transcript, did not appear in the original entry upon his docket, and thereupon the court permitted him to alter the transcript, so as to make it conform to his docket. The transcript showed that process was served on J. V. Redding, and that upon the return day of the summons, Redding appeared for the company and confessed a judgment. A witness testified that Redding was then the acting president of the company.

The motion to quash was overruled, and the movers appealed.

C. Jones, for appellant. 1. The confession was not in writing, as required by statute. (R. C. 1845, tit. Justices'

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Courts, art. 6, §2.) 2. Redding had no authority whatever to confess judgment for the company. 3. The court had no authority to permit the amendment.

Noell, for respondents.

SCOTT, Judge, delivered the opinion of the court.

It appears that Redding was the acting president of the Mammoth Mining Company. He, being such, was the proper person on whom process against the corporation should have been served. (R. C. 1845, tit. Corporations, 237.) Any irregularity in the return of the officer serving the process was waived by appearance and confession.

As the suit was begun by process, there was no necessity that the confession should be in writing, as the statute is express, that the provision in relation to confessing judgments by writing, shall not extend to cases in which confessions are taken in suits commenced by process. (R. C. 1845, tit. Justices' Courts, 656.)

Redding being the person appointed by law to defend the corporation, he was competent to confess the action. He might have suffered a judgment by default, and the matter is not made worse by an appearance and confession.

The execution was regular, and there was no necessity for the amendment allowed to be made by the justice. The other judges concurring, the judgment will be affirmed.

THE STATE, TO USE OF WHALEY, Appellant, vs. BLACKWELL,
Respondent.

1. The statute of limitations runs in favor of an administrator against the distributee of an estate from the date of the final settlement and order of distribution.

Appeal from Washington Circuit Court.

This was an action begun in 1853, on the bond of Jeremiah Blackwell, as one of the administrators of William Whaley, to

recover the distributive share of Israel Whaley, one of the heirs of William Whaley.

It appeared that Blackwell and one of the sons of the intestate, who had since died, acted as co-administrators, and that the son transacted the business of the estate, and held the assets. The administrators made their final settlement at the May term, 1836, showing a balance in their hands, for distribution, of \$181 52. It did not affirmatively appear that any order of distribution was ever made. The Circuit Court declared that the statute of limitations was a bar to a recovery by the plaintiff.

M. Frissell, for appellant. 1. The administrators are jointly and severally liable, although one alone handles the assets. (*Dobyns v. McGovern*, 15 Mo. 662. *Overton v. Woodson*, 17 Mo. Rep. 453.) 2. An administrator, being a trustee, cannot avail himself of the statutory bar against an heir or distributee. (*Falls v. Torrance*, 2 Hawks' Rep. 490. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190. *Prescott v. Gratz*, 6 Wheaton, 481. *Bird v. Graham*, 1 Ireland's Ch. Rep. 196.)

D. E. Perryman, for respondent. 1. The plaintiff's claim is barred by the statute of limitations, seventeen years having elapsed since the final settlement of the administrators. An administrator is a trustee only while he acts in the capacity of administrator, and not after his administration has closed. (*Menard v. Pratt*, 8 Mo. Rep. 286. 14 Mo. Rep. 437.) 2. Under all the circumstances of this case, lapse of time is an equitable if not a legal bar to the plaintiff's claim.

RYLAND, Judge, delivered the opinion of the court.

1. The statute of limitations relied on in this case, must be considered a bar to the plaintiff's right to recover. Here was a final settlement of the estate of William Whaley, deceased, made in May, 1836. Upon that settlement, the amount of \$181 52 remained in the administrators' hands to be distributed. Now, although the record is silent as to whether any order of distribution was made, directing the administrators to pay the

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distributees their shares of the amount on hand at such final settlement, it was competent for the court to have made such order; nay, it was the duty of the court to have made it; and, presuming that it was made, the plaintiff's right of action accrued on such settlement and order being made. His having laid by and slept upon his rights for seventeen years, and until the death of his brother, who was the active administrator, and who had, in all probability, the means of proof of payment; then to awake up and bring his suit against the co-administrator, who appears to have done little or nothing in the business, is enough at least to excite suspicion. The plaintiff is barred then, and the judgment below was very properly given against him. The principles set forth in the opinion of Judge Tompkins, when pronouncing the judgment of this court in the case of *The State, for use of Menard, v. Pratte & St. Gemme*, will fully sustain this view of the court. Let the judgment be affirmed; the other judges concurring.



THE STATE, TO THE USE OF REYBURN *et al.*, Appellants, *vs.*
RUGGLES *et al.*, Respondents.

1. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court.
2. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors.
3. Judgment reversed for an insufficient finding of the facts.

Appeal from Washington Circuit Court.

This was an action brought to the use of three of the legatees of Joseph Reyburn, deceased, against Ruggles and his securities, upon his bond as Reyburn's administrator. The

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breach complained of was, that Ruggles had failed to use proper diligence to collect two judgments recovered in favor of the estate by a former administrator, for an amount exceeding the unpaid balance of the plaintiffs' legacies, and that the amount of said judgments was lost to the estate by reason of his negligence. The plaintiffs prayed judgment for the penalty of the bond, with an award of execution for an amount sufficient to pay their legacies in full. The answer denied any want of diligence on the part of the administrator. The record showed that the cause was heard by the court without a jury, but contained no finding of the facts other than the amount for which the administrator was liable, and a statement from which it appeared that there were other legatees under the will of Reyburn, besides the plaintiffs. The court declared the law to be that, as the amount recovered against Ruggles was insufficient to satisfy *all* the legacies, the plaintiffs could only recover their *pro rata* share. Judgment was accordingly given for the penalty of the bond, with an award of several executions in favor of each of the plaintiffs for their *pro rata* share of the damages assessed. The plaintiffs, claiming that they were entitled to the full amount of their legacies out of the damages recovered before the other legatees received any thing, appealed to this court.

M. Frissell, for appellants, referred to the 5th, 7th and 8th sections of article 7 of the administration act, (R. C. 1845.)

No brief or appearance for respondent.

SCOTT, Judge, delivered the opinion of the court.

This is a singular proceeding. It appears that there has been a judgment against Ruggles. The record does not show that he contests the propriety of that judgment. But persons who are no parties to the proceedings on which the judgment is obtained, interpose, by motion, to have the judgment, in part, entered in their favor. There is no warrant in law for this. The judgment should have been entered for the penalty of the



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bond, with an award of a single execution for the damages assessed for the breaches thereof. When the sheriff brought the damages awarded into court, on the return day of the writ, (as he might have been notified to do,) then would have been the time for the court to have distributed them. The court had no authority to distribute the damages and award a separate execution for each distributee. Should the defendant, Ruggles, pay the costs of all these unnecessary writs?

The facts are not found which are necessary to enable this court to determine whether the plaintiffs are entitled to have their legacies first satisfied. As the matter is up, however, we will state our views of the law on this subject. It would be strange, if the law was such as to encourage a race between legatees, and to award the prize to the foremost. What justice would there be in suffering one legatee to sue on an executor's bond, and to obtain his legacy to the exclusion of all the others? If an executor pays a legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. In case the assets appear to have been originally deficient, if the executor either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. And even if such legatee obtain a decree for his legacy and be paid, the other legatees may oblige him to refund in the same manner. But if the executor had at first enough to pay all the legacies, and by his subsequent wasting of the assets they became deficient, in that case, such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence. (Toller, 340. *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614.)

Now, from the facts found, it does not appear that any part of the judgment is subject to the payment of legacies. It may be all necessary to pay debts. It is obvious that a legatee suing on an administrator's bond for a legacy, must show the same facts that he would be compelled to show had he sued the administrator by bill in equity. If the damages, when recovered, would be subject to the payment of debts, then the

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legatee would only be entitled to nominal damages in his action on the bond. If the amount of damages awarded in this case was the only fund for the payment of legacies, nothing more appearing, it would be a vain thing to satisfy the entire legacies of the plaintiffs, when the next moment they would be compelled to refund.

This case, from the record, appears to have been very irregularly conducted. It seems to be a very hard one on the administrator, Ruggles. None of the grounds on which he is made liable appear in the finding of the court, but as from this record, it does not appear that he complains or has brought the case here, we are not warranted in entering into that matter. The judgment will be reversed, and the cause remanded, that all the facts may be found. The other judges concur.

LIVINGSTON, Appellant, vs. DUGAN, Respondent.

1. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of title, the expenses of medical attendance which the latter might have to pay to a physician will be supported.
2. The compromise of a doubtful right is a good consideration for a promise.

Appeal from Washington Circuit Court.

This was an action originally begun before a justice of the peace by Livingston against Dugan, to recover money paid for medical attendance upon a slave, and for services in nursing.

It appeared that a suit was pending by Dugan and his brothers against Livingston, to recover the slave, Livingston being in possession, under a claim of title by purchase in good faith for a valuable consideration. The slave became sick, and during his sickness, as a witness testified, Dugan came to Livingston's house and promised to pay the latter the bill which he might have to pay to the physician who then was and pre-

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viously had been in attendance. Afterwards, the suit terminated in favor of the Dugans, who recovered judgment for the possession of the slave or for his value, without any damages for the detention. The Circuit Court declared the law to be, that the defendant's promise was without consideration and not binding, and gave judgment accordingly, from which the plaintiff appealed.

C. Jones, for appellant.

M. Frissell, for respondent, cited Chitty on Contracts, p. 52, and cases there cited.

SCOTT, Judge, delivered the opinion of the court.

1. From the facts in this case, we do not conceive that the principle that a past or executed consideration will not sustain a promise has any thing to do with it. Dugan promises to pay Livingston a sum of money, on condition that Livingston will thereafter pay that sum to another. Here the consideration is not past nor executed. Whether it is a valuable consideration is another question. A suit was pending for a slave, and some discussion arose between the parties as to the liability for the expense for medical services and nursing incurred for him. This would seem to place the case on the principle of a compromise of a doubtful right. No damages were recovered for the detention of the slave. We may presume, therefore, that his services were not of any value. The form of the action instituted by Dugan for the slave asserted his property in him. The plaintiff, Livingston, held him in good faith for a valuable consideration, under a claim of right. A question, therefore, might have been raised as to whether Dugan was not liable for the medical services. We do not say that he would have been. But it is enough to support this promise, that a question might have been raised in relation to it. The judgment is reversed, and the cause remanded, with the concurrence of the other judges.

KENNEDY & JACKSON, Appellants, vs. DANIELS, Respondents.

1. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of a merely equitable defence.

Appeal from Cape Girardeau Circuit Court.

The case is sufficiently stated in the opinion of the court. It was argued by Mr. N. Holmes for appellants, and Mr. Noell, for respondents.

GAMBLE, Judge, delivered the opinion of the court.

Ejectment for the recovery of land in Cape Girardeau county. The defendants answer that the plaintiffs are not the owners of the land, but that they, the defendants, are the owners thereof, claiming it under a deed from Micajah Daniels, older than the deed from said Micajah to plaintiffs.

The court, at the trial, decided upon inspection, that the instrument produced by the defendants as a conveyance from Micajah Daniels was not a deed; but further decided, that the instrument might be treated as a contract in equity for the land, and that the defendants might avail themselves of any equitable defence. The evidence was accordingly introduced, and under instructions from the court, a verdict was rendered and judgment was given for the defendants. The instrument relied on by defendants was, in the language of the present conveyance, from Micajah Daniels to them for the consideration "of one dollar, and for the affection and fatherly feeling I have for them."

1. We will confine the present decision to the point that the defendants, having set up in their answer, as their defence, the fact that they were the owners of the land by a deed from Micajah Daniels older than the deed from him to the plaintiffs, were not to be permitted to go into a totally different defence. If they have any equitable title available against that of the plain-

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tiffs, they must set it up in their answer. The loose practice introduced into our courts, under the present code, is clearly exemplified in this case. Both parties claim under deeds from Micajah Daniels, according to their pleadings; the court decides that there is no deed to defendants, but that they may make an equitable defence; such defence as they have is introduced, and a verdict is found in their favor. If this verdict is to be regarded as a response to the issue made by the pleadings, it finds that the defendants are the owners of the land under a deed from Micajah Daniels, older than his deed to the plaintiffs, which is against the decision of the court. This is only one specimen of the incongruities which are presented to this court upon the records, as they come to us under the present system of practice.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

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RANNEY, Respondent, vs. BROOKS & ERVIN, Appellants.

1. A note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff.

Appeal from Cape Girardeau Circuit Court.

This was an action upon the following sealed note:

“JACKSON, Mo., May 24th, 1852.

“Twelve months after date, we or either of us promise to pay to John P. Edinger, sheriff of Cape Girardeau county, Missouri, the sum of two hundred and seventy dollars, for value received, in the purchase of a tract of land sold to make partition thereof amongst the heirs of Joseph Whitney, deceased. Witness, our hands and seals.

“ANSEL ERVIN, (seal.)

“JOHN BROOKS,” (seal.)

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The note was by Edinger, on the 14th of January, 1853, before the expiration of his term of office, assigned to the plaintiff for value. At the May term, 1853, the court ordered the unfinished business in the partition suit to be transferred to William Morgan, Edinger's successor in office. At the same term, an order was made requiring the purchase money of the land to be paid to Morgan. The money was thus paid by Brooks, whereupon the court ordered a deed to be executed. Brooks paid the money to Morgan, with notice of the assignment of the note to plaintiff. Upon these facts, the Circuit Court gave judgment for the plaintiff for the amount of the note, from which the defendants appeal.

J. W. Noell, for appellants.

N. Holmes, for respondent. 1. The note was assignable by indorsement under the statute; and notice to the makers of the assignment before payment fixed their liability to the assignee (R. C. 1845, p. 89, §1, 2. 12 Mo. Rep. 127.) 2. The legal title to the note was vested in John P. Edinger, the payee, and the assignment of it by him by indorsement, for value received, was a collection of the money for which, as the purchase money of the land sold, he and his securities were alone liable. (12 Mo. 127. 9 Mo. 169. 9 Mo. 373. 14 Mo. 551.)

RYLAND, Judge, delivered the opinion of the court.

1. The bond on which this action is prosecuted, shows on its face that it was executed to John P. Edinger, and by him received in his character as sheriff of Cape Girardeau county. The promise is to pay to "John P. Edinger, sheriff of Cape Girardeau county, Missouri, the sum of \$270, for value received, in the purchase of a tract of land sold to make partition thereof, amongst the heirs of Joseph Whitney, deceased." This phraseology will necessarily show that the bond is not the individual property of Edinger. It is not given to John P. Edinger, "sheriff," stopping at that description; but it goes further—calls him "sheriff of Cape Girardeau county, Mis-

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souri ;" says it is "for a tract of land sold, (that is, by him, as such sheriff,) to make partition amongst the heirs of Whitney, deceased."

The statute concerning partition, when lands are sold for that purpose, directs the sheriff to take the notes or bonds for the purchase money, collect and pay over the same according to the order of the court.

The sheriff and his securities are responsible for his official acts in cases of partition. The same statute expressly declares: "If any sale be made by any sheriff before he goes out of office, and the business be not completed when he ceases to be sheriff, he may do all subsequent acts, collect and pay over the money and make the deed, in the same manner as if he continued to be sheriff; unless the Circuit Court shall, by order, direct the business to be transferred to the next sheriff; in which case, all acts remaining to be done by the sheriff, at the date of such order, shall be done by the sheriff then in office." The record shows that Edinger's term of office expired before he had completed the business of partition in the case of Whitney's heirs; and that the court, at May term, 1853, ordered the unfinished business of said partition to be transferred to William Morgan, who was then the sheriff of said county, for completion; and that the holder of the purchase money for said land, should pay the same to the said sheriff Morgan, or attorney of the partitioners for distribution; and that, thereupon, said Brooks, the purchaser, paid to said Morgan, sheriff as aforesaid, \$270, the purchase money for said land.

In our opinion, this bond given by Brooks and his security to Edinger, sheriff, for the land sold in the case of partition, bearing on its face evidence to all persons of its consideration, and of the official character of the payee, was liable as soon as Edinger should cease to be sheriff, to the order of the Circuit Court, transferring it to the next or new sheriff, for collection, in order to complete the business of partition. And the person who should receive such bond from the sheriff, by assignment, must take it liable to such order of the court. In this

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case, the order transferring the business having been made, and the person purchasing the land and owing the money having been ordered to pay the same to the new sheriff and having paid it, must be protected by such payment from any further demand by reason of such bond.

The judgment of the Circuit Court is therefore erroneous, and is, with the concurrence of the other judges, reversed.

CARMAN, Appellant, vs. JOHNSON, Respondent.

1. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry.
2. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity.
3. Under the new practice, a party who relies upon facts which would constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would formerly have been necessary in a bill in chancery.
4. The mere statement in an answer that the defendant's entry was prior to the entry upon which the plaintiff's patent issued, is no ground of equitable relief.

Appeal from Clark Circuit Court.

This was an action for the possession of forty acres of land, which the plaintiff claimed under a patent from the United States, dated April 19, 1850. The defendant claimed the land under an entry with the register and receiver of the land office at Palmyra, dated June 21st, 1847. Under the instructions of the Circuit Court, the substance of which is stated in the opinion of Judge Gamble, the plaintiff submitted to a nonsuit, and after an unsuccessful motion to set the same aside, appealed to this court.

Dryden, for appellant. 1. When there is authority in the officer issuing a patent to issue it, all enquiry into the regularity of his conduct in issuing it is precluded, except in a direct

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proceeding to vacate it. (*Allison v. Hunter*, 9 Mo. Rep. 758.) 2. A patent is a better legal title than an entry. (R. C. 1845, tit. Ejectment, §2, p. 440. *Allison v. Hunter*, 9 Mo. Rep. 758. *Bagnell v. Broderick*, 13 Peters, 436. *Griffith v. Deerfelt*, 17 Mo. Rep. 31.)

Anderson and Richmond, for respondent. 1. The entry of Johnson entitled him to the patent, and a subsequent entry by Carman was illegal, and the patent issued thereupon void. (*Groom v. Hill*, 9 Mo. Rep. 320. *Id.* 473, 741.) 2. Johnson's entry was *prima facie* correct, and no sufficient evidence was offered to rebut the presumption of its correctness.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff claims the land in controversy in this ejectment under a patent. The defendant sets up an entry older than the patent, and denies that, after his entry, the United States had a right to sell the land to the plaintiff, or to issue a patent, and alleges that the plaintiff obtained the patent by fraud, and that therefore it is void.

Evidence was given for the purpose of showing that the plaintiff, having entered by mistake a different tract of land, had applied to have the entry cancelled, and to have the money applied to the entry of the land now in dispute; such applications could only be acted upon and decided by the commissioner of the general land office; and that, pending the plaintiff's application before that officer, the defendant had been permitted to enter the land, upon condition that the entry was to be vacated if the application of plaintiff was sustained; that the plaintiff's application was sustained, and the officers of the land office vacated the entry of defendant and issued a patent to the plaintiff.

The Circuit Court, in the two instructions given at the request of the defendant, and which are the only instructions given, required that the plaintiff, in order to a recovery in this ejectment, should show facts anterior to his patent and prior to

the entry of defendant. The first of these instructions required that he should show an application to the register, made in a particular manner, and prior in time to the defendant's entry, or he could not recover. The second lays down the law broadly that he could not recover without showing an application *and entry* older than the defendant's entry.

The Supreme Court of the United States has repeatedly declared that the fee in land disposed of by the United States remains in the government until the patent issues, and this court has followed those decisions, acknowledging their obligation. In the present case, two parties claim the right of entering a particular portion of public land, and a controversy is carried on before the officers of the land department. The decision is in favor of the plaintiff, and his entry is recognized and the patent issues to him. The fee in the land is thus vested in him, and if there is any equity in favor of defendant, which would make the plaintiff a trustee of the fee for his benefit, that equity is to be enforced, not by declaring the patent void, but by a proceeding by which the fee would be transferred from the plaintiff to the defendant. If the defendant had a patent junior to that of the plaintiff, it might answer his purpose to have the elder patent declared void. The present action is simply an action of ejectment, and the parties rely on a patent on one side and an entry on the other. Between two such titles, as giving the right to possession, the law gives effect to the patent, in such action. (*Griffith v. Deerfelt & Powell*, 17 Mo. Rep. 31.) Nor does the effect of the patent depend upon the mere fact of priority of entry, for if the patent issues on the junior entry, it still transfers the fee which remained in the government after the first entry.

If the patent was obtained under such circumstances as would make the grantee in it a trustee for another, the mode of enforcing such equity, under our former practice, was to file a bill in a court of equity to compel a conveyance of the title held under the patent. If the same facts that would be sufficient to compel such conveyance can be available under our

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present practice, in the defence of an ejectment for the possession, they must be set up in the answer, with the same particularity that would be necessary in a bill in chancery.

The answer, in the present case, merely sets up the entry of defendant as prior to the date of the *plaintiff's patent*, and alleges that the patent was illegally and fraudulently obtained, and was, therefore, void. If the present defendant had sought, in a court of equity, to divest the plaintiff of the fee acquired by the patent, he would have stated the time when the plaintiff entered the land in the land office, and the circumstances under which the entry was permitted by the officers; whether under a mistake or upon false representations made by the plaintiff, setting forth the facts in relation to the mistake, or the representations made. In like manner, any other ground of equitable claim to the land, as against the grantee in a patent, would have been stated in a bill with precision. The only fact alleged in the answer in this case is, the fact that the defendant entered the land prior to the issuing of the plaintiff's patent. It is true that it is, in parts of the answer, assumed that the entry by the plaintiff was after that by the defendant, but it is not any where stated distinctly as a fact, that the entry by plaintiff was the junior entry. The date of it is not stated in the answer. Now the fact that the defendant's entry is older than the plaintiff's patent, is consistent with the fact that the entry upon which that patent issued may have been older than that of the defendant. But if it be assumed that the patent issued to plaintiff upon a junior entry, still, if in any case, under the laws of the United States and practice of the government, a patent could rightfully issue upon such junior entry, the mere statement that the defendant's entry was the elder, is not of itself the statement of a ground for equitable relief, for, in favor of the patent, the presumption will be made that the facts warranted the officer in issuing it. The record, in this case, shows that evidence was given upon the trial for the purpose of establishing the facts that Carman, the plaintiff, had, by mistake, made an erroneous entry upon other land, and that he had made an application to have the error corrected and the

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money applied to the purchase of the land in question, and that this application was pending in the general land office when the defendant's entry was made. This proceeding was under the act of March 3, 1819, (3 U. S. Stat. 526.) Without expressing any opinion upon the question, whether the evidence given established the fact of such application having been made before the defendant was permitted to enter the land, it is sufficient to say that it was a proper execution of that act, upon an application being made to correct the error in the previous entry, and apply the money to the payment for another specified tract, to hold the tract thus applied for as exempt from entry by others. At least, the officers of the government, in giving such construction and effect to the act, would not be regarded as attempting to exercise a power injurious to others. In such case, if the defendant succeeded in obtaining permission from the register to enter the land, it would be but the just exercise of the powers of the land department to refuse to recognize the entry of the defendant, provided the application of the plaintiff to correct the error in his previous entry was sustained, and his right to purchase the land entered by defendant was recognized. In such case, it is not believed that a court of equity would interfere to divest the title held under the patent. This, then, would be one case in which the mere priority of entry would create no equity against the person holding the patent under the junior entry, and this is only given as an instance. Other cases might be stated in which a court of equity would not disturb the title held under the patent, although another person had made the first entry.

The answer, then, in this case, if it be understood to allege that the defendant's entry was the elder, does not, by that statement alone, make a case for equitable relief, and the instructions of the the court, which required the plaintiff to go beyond his patent and prove an entry prior to that of defendant, were erroneous. The defendant, if he has a claim upon the courts to interpose for his relief, must show it more specifically.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

Creath v. Smith.

CREATH *et al.*, Plaintiffs in Error, *vs.* SMITH & ATKINS,
Defendants in Error.

1. A bill of review for errors apparent on the face of the record, will not lie after the time when a writ of error could be brought.
2. In this state, a decree against infants, divesting their title to real estate, is not erroneous, because no day is given them after coming of age to show cause against it. (SCOTT, J., dissenting.)

Error to Wayne Circuit Court.

This was a bill of review filed in 1851, by the heirs of William Creath, to reverse a decree rendered against them in 1840, upon a bill in chancery, filed by Zenas Smith.

The original bill, upon which the decree complained of was rendered, set forth substantially that Smith, the complainant therein, and William Creath, in his life time, were partners in business; that Smith having advanced more stock in trade than Creath, the latter conveyed to the firm certain real estate to be used as stock; that afterwards, said Smith & Creath purchased with partnership funds, and received in payment of debts, other real estate; that all of said real estate was entered upon the books of the firm as partnership property, and it was agreed between them that it should be held and treated as such; that, at the death of Creath, the firm was largely indebted, and that the indebtedness could not be discharged unless the said real estate was applied to that purpose. The complainant, Smith, prayed the court to decree that the real estate be sold, and that the proceeds, (after deducting such sum as might be assigned to the widow of Creath for her dower, unless the same could be set apart to her before the sale) be applied to the payment of the partnership liabilities. The widow and minor heirs of William Creath, and James A. Atkins, his administrator, were made defendants. The court appointed Atkins guardian *ad litem* of the minor heirs. He appeared and answered as guardian and also as administrator,

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admitting the allegations of the bill and consenting to a decree according to its prayer. His answer was not sworn to. The widow also filed an answer not sworn to, admitting the allegations of the bill, and accepting such portion of the real estate as might be set apart to her for her dower, or if the real estate could not be divided, such portion of the proceeds as might be assigned to her in lieu thereof. In October, 1840, the court, upon the bill, answer and exhibits, without further proof, decreed that the real estate be sold by a trustee appointed for that purpose, and that the proceeds, (after deducting the widow's dower,) be placed in the hands of Smith, the surviving partner, to be accounted for as partnership effects. The real estate was sold pursuant to the decree, and at the sale, Smith and Atkins became the purchasers. They afterwards received conveyances from the trustee for the portions purchased by them respectively. The trustee made report of his proceedings to the court, and they were approved.

In the present bill of review, the widow (who has since intermarried) and heirs of Creath seek to have the decree upon the original bill reversed, and the proceedings thereunder annulled. They state that the real estate was not needed to pay the partnership debts, that Smith had never accounted for the proceeds thereof, and that the widow had never received the sum assigned to her in lieu of dower. They specify as objections to the decree, that it was made absolute against minors, without giving them a day after coming of age to show cause against it; that the bill contained no sufficient allegations to justify it; that it was rendered upon the bill, answers and exhibits without any proof; that the answers of Atkins, as guardian and administrator, were not sworn to; and that a decree could not be rendered against minors upon the consent of their guardian.

A demurrer filed to the bill of review being sustained, the complainants sued out this writ of error.

E. & B. Bates and *T. Polk*, for plaintiffs in error, among other points, relied upon the following: An infant is entitled

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to a day after coming of age to show cause against a decree affecting his inheritance, "according to the rules, usage and practice of courts of equity," both English and American. (R. C. 1835, p. 506, §1. *Ruby v. Strother*, 11 Mo. Rep. 417. 14 Cond. Eng. Ch. Rep. (2d part,) 160. 1 Harr. Chan. 425. *Richmond v. Taylor*, 1 P. W'ms, 737. *Gregor v. Molesworth*, 2 Vesey, 109. Per Lord Eldon, in *Perry v. Phelin*, 17 Ves. 178. 2 P. W'ms, 401. 1 Story's Eq. 606, §652. Story's Eq. Pl. 322, §405. *Pope v. Le Mastre*, 5 Litt. 77. *Buler v. Bullet*, 4 Bibb, 11. *Williams v. Stratton*, 10 Sm. & M. (Miss.) 418. Id. 428. 1 Dessaus. 201. 1 Dessaus. 109. *Lamar v. Jones*, 3 Harr. & McH. 328. 1 Tenn. Rep. 79.)

Glover & Richardson, for defendants in error, among other points, argued that the omission of the clause in the decree giving day to the infant defendants, after coming of age, to show cause against it, did not render it erroneous. They insisted that the rule which required a day to be given in the decree in any case was an anomaly, and not founded in good reason, and that, admitting the general rule, the present case was an exception to it, as the infants were not required to execute any conveyance. They cited the following authorities upon this point. (8 Cond. Eng. Ch. Rep. 58. 2 Mylne & Keen, 409. 15 Mo. Rep. 394. 1 P. W'ms, 736. 1 Vernon, 295. 2 Vernon, 429. 1 Ves. & Bea. 223. *Goodier v. Ashton*, 18 Vesey. 4 Henn. & Munf. 450. Ambler, 419. 3 Dessaus. 18, 19, 20, 21. 2 J. C. R. 485. 3 J. C. R. 367.)

GAMBLE, Judge, delivered the opinion of the court.

1. The complainants in this case have filed their bill of review, seeking to reverse a decree made in 1840. The present bill was filed in 1851. There are several errors alleged to exist in the original decree, which need no extended notice, because, if they be admitted to exist, the limitation applicable to such reviews would prevent their being examined in this proceeding.

A bill of review, for errors apparent on the face of the record, will not lie after the time when a writ of error could be brought; for courts of equity, in this particular, govern themselves by the analogy of the common law, in regard to writs of error: Story's Equity Pleadings, 326. The statute has limited the prosecution of writs of error to five years after the rendition of any judgment complained of. Rev. Code, 1845. The same provision existed in the code of 1835.

2. There is one error assigned which probably is not withdrawn from the consideration of the court by the statute, which is, that the decree affects the inheritance of the present complainants, (defendants in the first suit,) who were then minors, and gives them no day after their majority for showing cause against the decree. The reason why this error, if it be one, is not cured by limitation is, that, if the due course of proceeding required that a day should be given, then there must have been the service of a subpoena upon the infant defendants after they came of age, to show cause against the decree, before it would become absolutely conclusive upon them, and therefore the limitation, on a bill of review, would not commence from the mere rendition of the decree. It is of importance to many titles in this State, that this question of the effect of not giving day in a decree against infants, should be settled, for, doubtless, there are many decrees in which no day has been given.

This question was considered by two of the judges of this court, and decided in *Hendricks v. McLean*, 18 Mo. Rep. 32, and the conclusion there pronounced was at variance with an intimation given in *Ruby v. Strother*, 11 Mo. Rep. 422. In the present case, as the same two judges alone concur in pronouncing the same judgment, the opinion will only be directed to the presentation of some additional views upon the question.

In what cases, then, was it necessary, according to the practice in chancery in England, to give day to an infant after he came of age, to show cause against the decree rendered against him in his minority? It is agreed in all the authorities that,

wherever a decree requires a conveyance to be made by a defendant who is at the time an infant, he shall have a day after attaining his full age, to show cause against the decree. It is also clear that, in a decree of strict foreclosure of a mortgage, which terminates the defendant's right to redeem, an infant defendant shall have a day given him. The first class embraces the great majority of cases reported in the English books, in which the necessity of giving a day has been maintained. In *Whitechurch v. Whitechurch*, 9 Mod. 125, it is said: "The court was clear in opinion that the decree should be final, for that, in cases of trusts, infants are always bound by decrees of this court, and so they are where the will of the ancestor is contested; and it is either set aside or confirmed in equity after trial of an issue *devisavit vel non*, or where it is otherwise set aside at law; and there is scarce any case, where an infant hath time to show cause against a decree, but where it is necessary for him to join in a conveyance in order to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure of mortgages." Lord Hardwicke, in *Sheffield v. The Duchess of Buckingham*, West's Rep. 684, expressed the same views in reference to the necessity of giving day to an infant, confining the practice to cases in which a conveyance, in form or substance, was required from the infant. In *Eyre v. The Countess of Shaftesbury*, 2 P. Wm's, 119, it is said that, in all decrees against infants, even in the plainest cases, a day must be given them to show cause, when they come of age; and this comprehensive language of the Lord Chancellor has often been quoted, as declaring the rule to be universal. But Macpherson, in his treatise on Infants, page 426, says: "That these expressions are too comprehensive, and that, in examining the state of the law before the recent changes, (by act of parliament,) we find the cases in which a day was given, carefully, though not, perhaps, with uniform correctness, distinguished from those in which it was not given." This author seems to regard the rule as properly stated by Lord Hardwicke, in *Sheffield v. The Duchess of Buckingham*. In

Price v. Carver, 3 Mylne & Craig, 163, Lord Cottenham says: "That the decree, (in that case,) in the event of the mortgage not being redeemed, after directing a foreclosure, directs a surrender or conveyance of the legal estate to the plaintiff;" and then, without considering whether the decree, in the form in which it was made, was correct, he remarks: "That the infant defendants would have had a day to show cause, according to the course hitherto pursued, *the decree being both to foreclose and to procure a conveyance from the infants.*"

In many of the American courts, the rule has been adopted of giving day, apparently without regard to its origin or extent in the English courts. In *Harlan et al. v. Barne's Administrator*, 5 Dana, 223, it was held to be necessary to give day to infant defendants to show cause against a decree by which land conveyed to trustees for their use by a voluntary conveyance from their father, who, at the time, was indebted to the plaintiffs under certain judgments, was subjected to sale to satisfy the judgments. The conveyance being of land which was subject to the payment of debts, and being made to hinder and delay creditors, (as is declared in the opinion of the court,) was void as to the complainants. Yet the court say the infant defendants must have day to show cause against the decree. It is obvious that if, in such case, the infants are to have this privilege, it would be difficult to state any relating to real estate in which it must not be given. It is an extreme case. I will not further refer to the many American cases in which this right to show cause is reserved to infant defendants. They are many, and from courts of high authority, although I have seen none which states the principle on which the privilege rests, with any clearness.

Lord Cottenham, in *Price v. Carver*, says, that the rule for giving day is not the equivalent in equity for the *parol demurring* at law. When the *parol demurs*, nothing is done to affect the infant until he comes of age; but where day is given to show cause, the decree is made in the minority of the infant, and on his failure to show cause, after being summoned, the

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decree becomes absolute. Yet, if the remark made in Macpherson on Infants, 427, that, "exactly co-extensive with the grant of a day to show cause, seems to be on principle, the right to make a new defence after decree," the decree itself is of but little value. It would be almost as well for the complainant that the parol should have demurred. It is true that it is said that, when day is given in a decree foreclosing a mortgage, that the infant, in showing cause, is not at liberty to go into the accounts, but is confined to showing error on the face of the decree, yet this is manifestly an exception to the general rule.

Now how is our law on this question? The codes of 1845, 1835 and 1825 provide, "That, in all cases where adequate relief cannot be had in the course of proceeding at law, the several courts in this state having chancery jurisdiction shall have power to proceed therein, according to the rules, usages and practice in courts of equity." Yet, chancery jurisdiction does not originate in the statutes found in either of these codes. The act of October 26, 1810, (1 Terr. Laws, 239,) vested chancery jurisdiction in the general court, and this before the common law, as a system, was introduced by statute. It may be said that the terms employed in this early act must be understood as introducing the English chancery modes of proceeding, because we look to that country for the distinction between proceedings at law and proceedings in chancery, although, at the date of the act, the common law was not introduced expressly by statute. There may be force in this view of the meaning of the act, but for the present, the only object in referring to this first act is, to show that the language employed in the subsequent codes has no peculiar meaning, when considering the present question.

If we examine the legislation of the state and of the preceding territorial government, we will see that the disposition of the estates of infants in most of the cases in which day was given in the equity courts of England, was made without any delay, and without the idea being entertained that the case was

to be opened when the infant attained his majority. In cases of foreclosure of a mortgage, the universal practice has been, since the act of 1807, to foreclose and sell the estate under statutes, without regard to the fact that the heir of the mortgagor was an infant. In the specific execution of contracts for the conveyance of land, and in all other cases in which, according to the usage and course of chancery, the court could decree a conveyance of real estate or delivery of personal property, the court, under the act of 22d January, 1816, (1 Terr. Laws, 451, sec. 2,) was *required* to decree that the estate pass from the defendant to the complainant *absolutely*, and the decree was to be recorded as a conveyance within one year after it was made. The same provisions are contained substantially in the subsequent acts regulating practice in chancery, except that the court is left at liberty to decree that a conveyance be executed or that the title pass. But in all, the decree is required to be recorded within a limited time after it is rendered. In the language of these acts, no distinction is made between infants and adult defendants, and the fact that the decree is to be recorded within a limited period, shows that the meaning of the act is, that the decree passes the title without any subsequent litigation. It is true that the code of 1825 makes provision for a proceeding in the court of chancery against the *executor or administrator* of a party who has contracted to convey real estate, and died without making the conveyance, in which the court is directed upon being satisfied that a decree for the specific execution ought to be made to make such decree, "saving to infants, married women, persons of unsound mind, and persons absent from the United States the term of five years after their respective disabilities are removed, to appear and file their petition or bill of review, to set aside such decree for fraud, collusion, or other cause." The decree thus made was to be carried into effect by a conveyance from the executor or administrator. The same provisions in substance are contained in the subsequent codes, except that the proceeding may be had in the county court. In the proceeding authorized

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by these acts, the heirs are not parties. The defendants are executors or administrators. The saving clause in the decree, which comprehends adults absent from the United States, as well as infants, married women and persons of unsound mind, has no analogy to the clause in a decree giving day to an infant defendant to show cause.

In Missouri, both before and since she became a state, the real estate which descended to an heir has been subject to sale on the application of an executor, administrator or creditor to satisfy debts, and in this proceeding, the title of the heir is completely and absolutely divested, without regard to the character or dignity of the debts. The real estate of an infant has always been subject to sale for his support or education, upon the application of his guardian to the inferior court having jurisdiction of such cases.

In the case now before the court, the original bill which was filed against the complainants in this bill of review, alleged that Creath, the ancestor of the complainants, was a partner in trade with Smith; that he conveyed to the firm, as a part of its stock, certain real estate, to be used as stock; that other real estate was taken in payment of debts due to the firm; that this real estate was entered in the books of the firm as partnership property; that there are debts of the firm, which cannot be paid without the application of this real estate. The bill then prays for a decree for the sale of the property by a commissioner to be appointed by the court. This rapid statement is made merely to show the nature of the proceeding.

The decree directs the sale of the estate by a commissioner named, and the terms. The sale was made, reported and approved, and the commissioner made the conveyances.

In the opinion of the court, the decree was not erroneous, because of a failure to give day to the infant defendants. The rule, as stated in *Whitechurch v. Whitechurch*, and by Lord Hardwicke, in *Sheffield v. The Duchess of Buckingham*, is the rule which we regard as the true rule in the English practice, and it will be seen, by reference to our own statutes, that

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that rule is not applicable here, or that our statutes are not framed upon the idea that such rule should prevail. The English parliament has lately interposed, and by 1 Will. IV, c. 47, §11, has authorized the courts of equity, in some cases, in which conveyances are required to be made by infants, to order the infants to make the conveyances, and has declared that such conveyances shall be as effectual as if the persons were adults.

The judgment of the Circuit Court is, with the concurrence of Judge Ryland, affirmed.

SCOTT, J. For my views in relation to the question involved in this case, reference is made to the case of *Ruby v. Strother*, 11 Mo. Rep. 422. I dissent from the opinion of the majority of the court.

WILKINSON *et al.*, Appellants, *vs.* THE AMERICAN IRON MOUNTAIN COMPANY, Respondent.

1. Neither by the Spanish law nor by the custom of Paris did a royal grant or gift to either of two spouses enter into the community.
2. The same rule applied to concessions in Louisiana, unless when made upon a consideration which was a burden on the community.
3. A marriage contract, entered into at Ste. Genevieve in 1797, contained this clause: "The intended consorts shall be in community as to all property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, &c. Held, the words "according to and in conformity with the custom of this place" referred to the *community*, and not to the acquisition of property, and the clause did not have the effect to bring into the community, property which would otherwise not be embraced by it.
4. The operation of a clause in a marriage contract, *establishing* a community, cannot be enlarged by a subsequent clause providing for a *renunciation* of it.

Appeal from St. François Circuit Court.

This was an action brought in 1852 by six of the eleven children and heirs of Marie and Joseph Pratte, to recover an undivided three-elevenths of 20,000 arpens of land on the head

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waters of the St. François river, known as the Iron Mountain tract, confirmed to Joseph Pratte by act of congress of July 4th, 1836.

The plaintiffs claimed in right of their mother, under a marriage contract entered into by the said Joseph and Marie, shortly before their marriage, dated Ste. Genevieve, February 4, 1797, which was claimed to have the effect to establish a community between them as to the land in controversy, subsequently conceded to the husband by the Spanish authorities. The defendant claimed the whole tract under conveyances from Joseph Pratte and his wife during their life time, but not properly acknowledged to operate upon the wife's community interest, if she had any, and if her husband was not competent to convey it. A translation of the marriage contract was annexed to the plaintiffs' petition, the original being in the French language. The following are its provisions, as translated in the record, so far as they bear upon the questions in this case :

"The intended consorts shall be in community as to all personal property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, although they might hereafter live or acquire property in countries (governed by) contrary laws, usages and customs, which they do by these presents expressly renounce and disclaim." * * *

"The intended consorts take each other with the claims to them belonging, whether due or to become due, coming to them from their respective fathers and mothers, in whatever places they may be situated. Those of the intended husband consisting now of 3000 livres due to him out of the inheritance of his deceased mother, which his father promises to pay him immediately after the celebration of the said marriage, shall enter into the mass of the said community. And those of the intended wife, consisting of five thousand livres, as her portion and advance on inheritance, which her father and mother promise also to pay her after the celebration of the said marriage, shall also enter into the said community." * * * * *

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“In consideration of the marriage, the said intended husband has endowed and does endow the said intended wife with the sum of five hundred livres of *prefixed* (prefix) dower, to be paid over, to be had and taken as soon as she has a right to it, out of all the personal and real property, present and to come, of the said intended husband, who has pledged and mortgaged the same, for the purpose of furnishing and securing the said dower, which the said intended wife shall enjoy and possess according to the custom of this place, without her being obliged to sue for it. The survivor of the said intended consorts shall take by *preciput*; and before making any division of the property belonging to their community, the sum of two hundred and fifty livres in personal property of the said community, according to the appraisalment of the inventory and without overrating; the said sum (to be paid) in cash at his (survivor's) choice and option.”

“It shall be allowed to the said intended wife and to the children who may be born of said marriage, by renouncing the said community, to take back all that she will have brought to said marriage, and that which shall have come and befallen to her during said marriage, whether it be personal or real property, by inheritance, donation, bequest or otherwise; and the said intended wife, if she survives, (shall have a right to take) her dower and *preciput* (or jointure) as above (specified,) the whole being free and clear of all debts and mortgages of the said community, although she might have spoken in the same, bound herself or been condemned to (pay said debts and mortgages) for which, in such case, she and her children shall be *acquitted* and indemnified on the property of the said intended husband, on which property, for this reason and for the fulfillment of all the clauses and conditions of the present contract, there shall be a mortgage from this day.” * * *

It appeared that this marriage contract was never recorded, as required by the act of December 22, 1824.

On the 28th of September, 1797, after his marriage, Joseph Pratte addressed to Don Zenon Trudeau, lieutenant governor

of Upper Louisiana, a petition for a grant of 20,000 arpens of land on the waters of the St. François river, stating that he wished to form a settlement, and that the lands asked for were "suitable to his views, as well for agriculture, as for the raising of a great quantity of cattle, with which he is well provided," and that the quantity asked was "proportionate to his strength and means for improving them." It was found by the Circuit Court that Joseph Pratte applied for this concession at the instance of his wife's father, Francis Valle. Valle had previously obtained a grant for 400 arpens, including the Iron Mountain, and desiring to procure a larger quantity for the benefit of his children, and fearing that he could not do so in his own name, he procured his son-in-law, Pratte, to apply for and obtain a concession for the 20,000 arpens, including the 400 arpens before granted to him, which he relinquished. Pratte was to hold the land for the benefit of himself and Valle's other children in equal shares.

On the 17th of October, 1797, the lieutenant governor ordered the surveyor to survey the land asked for by Pratte, and deliver to him a plat and certificate of the survey, to serve him as a title, until a more formal title could be obtained from the governor general.

In December, 1811, Pratte presented his claim to the United States board of commissioners for confirmation, and it was rejected.

On the 2d of June, 1829, Pratte and wife, pursuant to the arrangement with Francis Valle before the concession, joined in a deed conveying to the other heirs of Francis Valle, the undivided six-sevenths of the tract in controversy. This deed was acknowledged before the clerk of the Circuit Court. The certificate stated that the wife acknowledged that she "executed the same freely and voluntarily, and relinquished her dower," &c., but omitted to state that she was made acquainted with the contents.

In 1834, Pratte's claim was, by the board of commissioners,
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recommended for confirmation, and confirmed by the act of July 4, 1836.

On the 13th of February, 1837, Pratte and wife joined in a deed conveying to John L. Vandoren the undivided one-seventh of the tract. This deed was acknowledged before a judge of the county court, and the certificate stated that the wife "acknowledged that she executed the deed and relinquished her dower," &c. Marie Pratte died in 1841, and Joseph Pratte in 1846, leaving the plaintiffs and others their heirs at law.

All the title which passed by the two deeds from Pratte and wife, of June 2, 1829, and February 13, 1837, was in the American Iron Mountain company.

The Circuit Court declared that the grant of the land in controversy to Joseph Pratte vested in him the complete title, and that the same did not enter into the community established by the contract between him and his wife; and that, even if it did enter into the community, yet the husband, as the head of the community, could alienate it; and that therefore the plaintiffs could not recover. The case was argued in this court by Mr. Noell and Mr. Frissell, for appellants, and by Mr. Field and Mr. Young, for respondent. The following points were made:

Mr. *Noell* and Mr. *Frissell*, for appellants. 1. The concession of 1797 to Joseph Pratte was not a royal gift, but a grant founded on considerations which appear in the evidence before the board of commissioners. (4 Mart. N. S. R. 212.) 2. If such concession be a royal gift, still by the terms of the marriage contract, it went into the community. (*Fabre et al. v. Sparks*, 12 Rob. 31.) 3. The marriage contract in evidence this case was an authentic act, and a record under the Spanish law, and imparted notice to all the world of its contents. (*McNair v. Dodge*, 7 Mo.) 4. The property in controversy having entered into the community while the Spanish law was in force in 1797, its character as community property was fixed, and the inchoate right of the mother of plaintiffs was vested, and all persons were bound to take notice of it; and the act of

1825, requiring marriage contracts to be recorded could not have the effect to divest rights, or to destroy the effect of notice which had already attached to the property, and by which all persons and parties were bound, and had been for twenty-eight years. 5. The law in force at the time of the marriage of Joseph Pratte and Marie Valle established the community upon the mere fact of marriage, independent of any contract; and as to all property acquired before the change of government, the community right attaches, and there is no notice in fact required as to the date of the marriage and the law in force fixing the wife's inchoate right in property acquired by the husband in his own name; but purchasers acquiring title from the husband stand on the same footing, as to notice, as the same class of persons do in reference to the wife's dower at common law or under the statute. 6. The deed of 1829 is insufficient, from the character and form of the acknowledgment, to pass any interest of the wife. 7. The facts do not establish a trust in favor of the grantees in the deed of 1829, and if a trust was established, it was in favor of all the heirs of Francis Valle, and the mother of plaintiffs, being one of them, was entitled to one-seventh of the land in her own right, which did not pass by the deed to Vandoren. 8. The concession being obtained through the influence and assistance of Francis Valle, the father of Mrs. Pratte, and she being the meritorious consideration of the concession thus obtained, according to the principles and spirit of the Spanish law, the property becomes paraphernal, and the husband could not convey it, even under the Spanish law.

Mr. *Field* and Mr. *Young*, for respondent. I. The marriage contract of Joseph Pratte and his wife, not having been recorded pursuant to the provisions of the act of 1824, was invalid as to the defendant being a *bona fide* purchaser without notice. (*Wilkinson v. Rozier*, 19 Mo. Rep.) II. The land conceded by the Spanish government to Joseph Pratte being a royal grant out of grace and favor, and not as a reward for services rendered or a price paid, did not enter into the community. 1.

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Not by the rule of the Spanish law regulating community. (*Gayoso v. Garcia*, 1 Mart. N. S. 333. *Frique v. Hopkins*, 4 id. 214. *Rouquier v. Rouquier*, 5 id. 99. *Hughey v. Barrow*, 4 La. An. 250. Escriche, Dicc. Juris. Voc. Bienes gananciales.) 2. Not by the custom of Paris. (Chapin, *Coût. de Paris*, liv. 11, tit. 1, §12. Lebrun, *Traité, de Comm.* liv. 1, c. 5, §30) III. If the land in question were part of the community property, the deed of the husband was competent to convey it. (*Moreau v. Detchemendy*, 18 Mo. Rep. 522.) IV. The confirmation to Joseph Pratte individually merged all the rights of the wife arising under any antecedent law or contract of community; and the purchaser under the husband acquired a perfect title. (*Guyol v. Chouteau*, 19 Mo. Rep. 546.)

GAMBLE, Judge, delivered the opinion of the court.

The first question presented by the parties in the discussion of this case is, whether the land granted by the Spanish authorities to Joseph Pratte came into the community established by the contract between him and his wife. If it did not, there is an end of the case, because the plaintiffs only claim under the wife of Joseph Pratte, upon the ground that it was property of the community.

We look to the petition which was presented to the lieutenant governor, and to that alone, to ascertain the grounds upon which Pratte applied for a concession, and when the order to put the party in possession of the land, made by the lieutenant governor upon the petition, suggests no other consideration for the grant than that contained in the petition, we find the motives and considerations upon which the concession was made to be just those set out in the petition. In the present case, the grant was a mere bounty, having no reference to the existence of the community.

A royal grant or gift to either of two spouses did not enter into the community of acquisitions and gains, which, under the Spanish law, resulted from the mere fact of marriage. (*Gay-*

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oso v. Garcia, 1 Mart. N. S. 334. *Frique v. Hopkins*, 4 Mart. N. S. 212. 5 id. 98. *Hughey v. Barrow*, 4 Ann. L. R. 250.) In *Frique v. Hopkins*, the rule of the Spanish law is considered as applying to concessions made in Louisiana, and the application of the rule is made, upon consideration of the motives upon which such concessions were ordinarily given. If it appeared that the concession was made upon a consideration which was a burden on the community, the case would be an exception to the general rule. This concession or the land granted would not have come into the community created by law upon the marriage of Joseph Pratte and his wife.

The question then arises upon the construction of the marriage contract between Pratte and his wife, whether that contract had the effect of making it a part of the community property. The petition alleges that the contract is in the French language, and the original is not filed with the petition, but a paper is, which is called a translation, and which is treated throughout the trial as a correct translation.

The clause in it which establishes the community, is in these words: "The intended consorts shall be in community as to all personal property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, although they might hereafter live or acquire property in countries governed by contrary laws, usages and customs, which they do by these presents expressly renounce and disclaim."

It is to be regretted that we have not the original of this contract in the record, for some of the terms employed in the translation, such as "personal property" and "real estate" satisfy us that it is rather a free translation, if the words of the original are those commonly used in such instruments, and in the argument of the case, the counsel have admitted that the words "acquets" and "conquets" are used in the original as a designation of the property brought into the community.

But we will consider the words used in the translation. The parties are to be in community as to all personal property and

real estate acquired during marriage, according to and in conformity with the customs of the place. What is to be according to and in conformity with the custom? Not the acquisition of the property certainly. Then it can only be the *community* in the personal and real property, which is to be according to and in conformity with the custom. The clause has the same meaning as if it read, "the parties shall be in community according to and in conformity with the custom of the place, in all personal property and real estate acquired during marriage." The words were arranged in the first clause of the sentence in the order in which they stand in the contract, simply because, in the latter clause of the sentence, the custom was to be declared the rule of the community in other countries, and by making the custom the last subject in the first clause, the second applies to the same subject, without any necessity for repetition of words, and without interrupting the train of ideas.

Taking this to be the meaning of the clause which establishes the community, we look only to the custom referred to, in order to ascertain what property came into the community, and in the absence of any special local custom, if we take either the custom of Paris, or the Spanish law to be the rule, a royal gift to either spouse does not belong to the community. It has been insisted that other clauses of this contract give a wider scope to that which creates the community.

The clause which brings into the community the money due to the husband out of the inheritance of his deceased mother, and that promised to the wife by her father, by way of advancement, if it be understood to bring to the community funds which, from their character as inheritance or donation, would not enter into the community as created by law, shows that the first clause, which established the community, was not understood to have the effect of bringing them in by its general terms. The argument then, from this clause, is legitimate, that it was deemed necessary to specify, as parts of the community property, that which was not of a description otherwise

to become such by law, and consequently a royal grant did not enter into it without a specification that would embrace it.

The clause providing for a renunciation of the community by the wife, or her children, is also supposed to afford a reason for giving to the community clause a construction which will bring within it the present property, although a royal gift. This clause allows the wife, upon a renunciation of the community, to take back all that she shall have brought into the marriage, without its being liable for the debts of the community, and giving a mortgage upon all the husband's property for the reimbursement of any sums she may have been obliged to pay, and for the general fulfillment of the clauses and stipulations of the contract. The argument is that, because she is allowed to take back all that she shall have brought to said marriage, "and all that shall have come and fallen to her during marriage, whether it be personal or real property, by inheritance, donation, bequest or otherwise;" that, therefore, the community is to be held to include all property of every description.

A renunciation of the community is an abandonment of all claim under it, and places the parties in altogether different relations in respect to the property which they respectively possessed and the profits arising from its use during marriage. The language of this clause is in a common form, and does not contribute to give greater force or scope to that which fixes the extent of the community. The case of *Fabre v. Sparks*, 12 Rob. 31, gives no support to the construction here contended for. There, a marriage contract which created a community in all their estate, real and personal, "present and to come," stipulated that, upon the death of either party, without children of the marriage, the amount of "property brought into the community" should go to the surviving husband or wife. The question was, what property was embraced in this last clause in favor of the survivor, and it was held that all the property of each, "present and to come," being brought into the community, that was the property to which the survivor

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was entitled, whether owned at the time of the marriage or subsequently acquired. In the present case, the attempt is to enlarge the operation of the principal clause establishing the community, by reference to another clause providing for a renunciation of the community. The latter clause cannot have this effect, nor, in fact, does it require us to give such force to its language, if it could legitimately so affect the first clause. The chief object of this latter clause is, to free the property of the wife, on a renunciation, from liability for the debts of the community, and give her a mortgage on her husband's property, so as to preserve to her the right of election at the dissolution of the community, either to abide by it and take her interests under it, or if that was not to her interest, then to take back her property without liability for debts, and so to stand preferred over all creditors, and also to have a mortgage for her security upon her husband's property.

Upon the whole, we think this property did not enter into the community, and therefore the plaintiffs are not entitled to recover. The judgment is, with the concurrence of the other judges, affirmed.

DAVIDSON, Appellant, vs, ROZIER, Respondent.

1. Judgment reversed because the record contained no finding of facts, the case being tried by the court without a jury.

Appeal from St. François Circuit Court.

D. E. Perryman, for appellant.

M. Frissell, for respondent, confessed error.

GAMBLE, Judge. Trial of issues before the court without a jury. No finding of facts by the court. Judgment reversed and cause remanded.

Jamison's Adm'r v. Hughes.—Valentine v. Havener.

JAMISON'S ADM'R, Appellant, *vs.* HUGHES, Respondent.

1. No finding of facts.

Appeal from Washington Circuit Court.

J. W. Noell, for appellant.

M. Frissell, for respondent.

GAMBLE, Judge. Trial of issues before the court without a jury. No finding of the facts by the court. Judgment reversed and the cause remanded.

VALENTINE, Respondent, *vs.* HAVENER, Appellant.

1. The only effect of a failure by a mortgagee to make a subsequent incumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure.
2. An unrecorded deed is good against a judgment, if recorded before an execution sale under the judgment. (*Davis v. Ownsby*, 14 Mo. Rep. 170, affirmed. Scott, J., dissenting.)

Appeal from Franklin Circuit Court.

Action for the possession of land. The plaintiff claimed under a mortgage executed to him by John F. L. Brown, dated July 22, 1844, and recorded January 26, 1846. Suit was brought against Brown alone to foreclose the mortgage, the plaintiff purchased the land at an execution sale under the judgment of foreclosure, and received from the sheriff a deed dated April 9, 1852.

The defendant answered, setting up that his landlord purchased the land at an execution sale under a judgment rendered on the 4th of October, 1845, against Brown and another, and that he received a sheriff's deed dated April 10, 1846. The deed showed that the levy under which the sale was made,

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took place on the 16th of March, 1846. The defendant further insisted that his landlord was not bound by the proceeding to foreclose the mortgage, because not a party to it. This answer was, on motion, stricken out, and judgment entered for the plaintiff, from which the defendant appealed.

M. Frissell, for appellant. Under the 8th section of the act concerning mortgages, (R. C. 1845,) the defendant, not being a party to the suit to foreclose, is not bound by the judgment of foreclosure. After foreclosure and sale, and the execution of the deed, the mortgage is merged, and is of no further use than to show the date of the inception of the title conveyed by the deed.

Stevenson and Gale, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The only question for our consideration in this case involves the propriety of the act of the court below in striking out the answer of the defendant to the plaintiff's petition.

The plaintiff sets up his right to the possession of the land mentioned in his petition, under the mortgage made by John F. L. Brown. This mortgage appears from the record to be dated 22d July, 1844; was acknowledged the same day, and filed for record in the proper office in Franklin county, where the mortgaged premises are situated, on the 26th January, 1846, and was recorded January 30th, 1846. Plaintiff shows a sheriff's deed to the premises, made to plaintiff under a sale by virtue of an execution on a judgment foreclosing the mortgage. This sheriff's deed was dated 9th April, 1852. In short, the plaintiff's petition sets up a right to the possession of the land mentioned, under the mortgage made by said John F. L. Brown.

The defendant's answer shows that he claims possession of the land in the plaintiff's petition mentioned, by virtue of a sheriff's deed, dated and executed on the 10th of April, 1846, made by virtue of a sale by the sheriff of Franklin county,

on an execution issued on a judgment of Franklin Circuit Court, rendered on the 4th of October, 1845, in favor of John C. McKenney and Nancy McKenney, against John F. L. Brown and William J. Brown; that the sheriff executed the deed to William J. Brown, and that the same was duly recorded before the proceedings to foreclose the mortgage by which the plaintiff claims title; and that the said William J. Brown was not made a party to that proceeding, and is no wise bound thereby; nor is the plaintiff entitled to the possession, as against the said William J. Brown or any person holding under him; that the defendant holds possession as tenant of William J. Brown, assignee of John F. L. Brown, as above stated; that, from the date of the sale above stated, possession has been held in conformity with said deed.

The plaintiff moved the court to strike out this answer of defendant, and assigned, among other reasons, that the answer of defendant did not set up any defence in law to the action of plaintiff; that no title was acquired by the said William J. Brown, which could affect the plaintiff's claim under the mortgage.

The court sustained this motion, struck out the answer, and the defendant failing to file another or amended answer, judgment was had against him, and he appeals to this court.

1. In the opinion of this court, the facts set forth in the defendant's answer constitute no defence to the plaintiff's right of possession, as set forth in his petition, and the same was properly stricken out.

The plaintiff shows that the mortgage was executed to him on 22d July, 1844; that he proceeded to foreclose this mortgage and became the purchaser. All the interest and estate then that the mortgagor had, at the date of the mortgage, by virtue of this foreclosure, and sale and purchase by plaintiff, became vested in the plaintiff. John F. L. Brown had no title after that sale. So far as he was concerned, all the title which he had at the date of the mortgage passed over to the mortgagee, the plaintiff, by that sale.

This sale to the plaintiff took place after the defendant purchased John F. L. Brown's interest at the sheriff's sale, on McKenney's execution. McKenney's judgment was of date prior to the time of the *recording* of the mortgage; yet the mortgage was elder than the judgment, and was recorded *before* the defendant's purchase.

So far then as between mortgagor and the mortgagee, the plaintiff has all the right and estate which both had at the date of the mortgage, by virtue of the said foreclosure and sale.

The defendant, therefore, although the mortgage may, as to him, be considered open, and he may be at liberty to redeem it, he being no party to the foreclosure, cannot set up John F. L. Brown's title and right, so as to defeat this plaintiff's action. The effect of the omission to make the incumbrancer a party to the proceeding to foreclose, will be and can be only to let such incumbrancer redeem in this case.

2. But, in my view of this subject, the prior mortgage, though not recorded until after judgment, yet being recorded before the sale under the execution issued on this judgment, at which the defendant buys, said mortgage being afterwards foreclosed and property sold, the purchaser at the sale on the foreclosure will hold against the purchaser under the judgment. This view is in accordance with the principles of this court, expressed in the case of *Davis v. Ownsby*, 14 Mo. Rep. 170; and Judge Gamble concurs fully with this view, and with the law as laid down there. Judge Scott dissenting.

PAGE, Defendant in Error, *vs.* THE CITY OF ST. LOUIS,
Plaintiff in Error.

1. The illegal exemption by city ordinance of the property of one tax payer from assessment for a special sewer tax, will not authorize an injunction to restrain the city from collecting the assessment against another tax payer, not exceeding the amount which the city was authorized to impose; certainly not, unless it appears that, upon payment of the assessment sought to be enjoined, the plaintiff will have paid more than would have been his proportion had it not been for the exemption.

Error to St. Louis Circuit Court.

The case is stated in the opinion of the court. It was argued by Mr. Gantt, for the city, and by Mr. Shepley, for the defendant in error.

Mr. Gantt, for the city, relied upon the following points : 1. The agreement made by the city with Lucas, under section nine of the ordinance, was legal, his lot only being exempt from taxation when its due proportion of the sewer debt had been fully paid ; and being legal when made, no subsequent change in the value of the property, by putting up improvements or otherwise, could render it illegal. 2. No inequality in the tax is produced by the exemption, because the money paid by Lucas must be taken to have been applied to the payment of a portion of the sewer debt, and it is only for the remainder of the debt that the remainder of the property is taxed. 3. The property of the defendant in error is bound to pay one half of one per cent. per annum, during the existence of the debt, towards its extinction. He has only paid the assessment for one year. Under no circumstances, could he have less than one half of one per cent. to pay for the second year, unless the whole debt is liable to be extinguished by two years' taxes, which is contrary to the whole tenor of the petition. As he shows no *present* injury by reason of the composition with Lucas, but at most, only a *possibility* of a future injury, his bill should be dismissed. 4. At most, if the contract with Lucas is illegal, Page is only entitled to be put in the same position that he would occupy, if the contract had not been made. He can only call for a reduction of his tax to what it would have been, if the lot of Lucas had been taxed also. It cannot be that the omission of one lot from assessment renders the whole assessment void, and authorizes the courts to stop the collection of any part of the tax by injunction.

Mr. Shepley, for defendant in error, relied upon the following points : 1. The act of March 12, 1849, contemplates

that the sewer tax shall be levied and collected *annually*, according to the varying value of the property. 2. If the city fails to levy the tax upon any particular piece of property in a sewer district for any year, then persons whose property is assessed can restrain the city from enforcing the tax against them, unless the city can show that the omission was through inadvertence, or that the property omitted was legally exempt. The right to remit taxes already assessed is not denied, because no greater amount would thereby be imposed upon other property, and the city alone would suffer inconvenience; but the power of the city to exempt any particular portion of the city from assessment, and to apportion the public burdens upon the remainder, is denied. Even however, if we admit the general power, it has no application to this case, where, by the act, a power is given to do a particular work in a particular part of the city, and to assess those who are supposed to be benefitted by it, for its cost, in the way therein provided. 3. Unless the assessment upon plaintiff's property is made in strict conformity with the act, the lien therein provided does not attach, and the city has no power to sell the property for it, and the plaintiff is entitled to have the sale enjoined. 4. The 9th section of ordinance No. 2498, under which this commutation and consequent exemption is made, is repugnant to the plain provisions of the act. So far as this suit is concerned, it is unimportant whether this section is absolutely void, or whether it is binding on the city. If it is absolutely void, then the plaintiff is entitled to relief, so long as the city continues to treat it as a valid ordinance. If it is binding on the city, as against those who have availed themselves of its privileges, then the city must continue to assess the property as if it was not exempt, and itself assume the payment of the assessments; and not having done so, the plaintiff is entitled to relief. 5. The petition clearly shows that this commutation and exemption of the lots of Lucas and others operates and must continue to operate to the injury of plaintiff. How far it was detrimental, it was not in the power of the plaintiff to state in dollars and

cents. It is shown that property liable to the sewer tax, in amount equal to the value of the improvements put upon the lot of Lucas, was illegally exempted from the tax for the whole period that it should continue to be imposed. It is no answer to say that possibly, by a change of circumstances, it may happen that no injury will be done. According to this idea, the plaintiff would be entitled to no relief, however illegal the exemption is, until it could be shown, at the final winding up, mathematically, what injury he had sustained, and then he would be precisely in the situation where he could obtain no relief. 6. The plaintiff is entitled to have relief, although he does not in his petition show to what extent the assessment is illegal, nor offer to pay such proportion of the amount assessed as may be legal. It is beyond his power to say what the legal assessment should be. It is for the city to make a legal assessment, and until this is done, no lien can be enforced against the plaintiff's property. 7. There is no public inconvenience or damage occasioned by compelling the city to carry out the plain provisions of the act, and it is perfectly in the power of the city yet to do so. If the 9th section of the ordinance is a nullity, all that the city has to do is, to return to those who have availed themselves of its privileges the money paid and interest, and then it can treat their property as if no such privilege had been given them. If the composition is binding on the city, then it can continue to assess the property as above suggested, and itself assume the payment.

SCOTT, Judge, delivered the opinion of the court.

In March, 1849, the general assembly of Missouri passed an act to provide a general system of sewerage in the city of St. Louis. This act, among other things, provided that the city should be laid off into districts, to be drained, and that, on the presentation of a petition of the majority of the owners of real estate within any district, the mayor and council should have power to borrow any sum of money necessary to construct

sewers in such district, and to issue the bonds of the city for the same, to be paid (principal and interest) by a tax to be levied on the real estate within such district. The tax to be laid was not to exceed one half of one per cent. per annum on the assessed value of the real estate, and was to be levied and collected annually, and to be a lien on the estate, and was not to be repealed or altered until the debt created for the district was paid.

In pursuance of this act, the city, in July, 1850, passed an ordinance providing for the creation and management of a common sewer fund. This ordinance provided for borrowing money to construct sewers, and ordained, by its 9th section, that whenever, on account of any lot within any sewer district, such amount of money as will bear the same proportion to the total amount of debt appearing on the account of said district, as the assessed value of the lot for the preceding year bears to the assessed value of the whole district, shall be paid into the city treasury, such amount shall be credited on said account, and such lot shall be exempt from further taxation on account of the debt then existing.

Afterwards, a sewer district was created, running from the river west to Sixth street, embracing one half of the squares on each side of Chesnut street. Within this district, the plaintiff, Daniel D. Page, had improved real estate, subject to the sewer tax. Within the same district, James H. Lucas had real estate subject likewise to taxation. With respect to this property Lucas availed himself of the 9th section of the ordinance above recited, and paid such a proportion of the sewer debt of the district as the assessed value of his real estate bore to the assessed value of the entire district. Afterwards, Lucas made improvements on his real estate, situated within the district, which it is alleged greatly enhanced the value thereof, probably to near double its value without the improvements. Since the commutation made as above stated, Lucas' property has ceased to be taxed on account of the sewer debt of the district. The property of the plaintiff was assessed for the year 1852, at one half

of one per cent. on its assessed value, amounting to \$125 34, and it is now advertised for sale for the taxes for said year. The property of the plaintiff, for the year 1850, was assessed at one per cent., double the amount that by law it could be taxed, which he, under a mistake, paid at the time, but which he has found since to be incorrect.

On this state of facts, the plaintiff maintains that no lien has been created on his real estate within the district for the sewer tax, by reason of the 9th section of the ordinance above mentioned being in violation of the act of the general assembly authorizing the city to provide a fund for constructing sewers, and consequently void. He therefore prays an injunction to restrain the sale of his real estate, and that the excess of tax paid for the year 1850 may be refunded to him.

To this bill, there was a demurrer filed, which being overruled and no answer being filed, a judgment was rendered perpetuating the injunction.

The plaintiff withdrew so much of his petition as sought a recovery of the excess of the tax due for the year 1850.

Two of the grounds of the demurrer to the bill are, that it shows no ground for an injunction, and that, from the facts as stated by the plaintiff, it does not appear that he will sustain any injury by the action of the city authorities.

1. We are impressed with a sense of the great inconvenience that would result from establishing it as a principle, that a court would be warranted in arresting the exercise of the municipal authority of a city, on the ground of the incompatibility of one of its ordinances with its charter. Our system of jurisprudence would be deemed defective, indeed, could it not redress the grievance of a private individual without inflicting so great a public injury.

We are not prepared to say that the 9th section of the ordinance above cited is void, as being contrary to the provisions of the act of the general assembly relating to sewers in St. Louis. Its policy depends on considerations which are not disclosed by this record. It is easy to imagine a state of things

that would render such a provision as is contained in the section of the ordinance under consideration, highly expedient. As the sewers were to be built with borrowed money, a provision increasing the certainty of the means to meet the semi-annual interest, would have an influence on the price of the bonds in the market. Whether, upon the whole, the ordinance is not beneficial in its operation, we cannot see. It does not appear to have been repealed, so as to prevent others from availing themselves of it. Whether the entire sum paid by Lucas was as valuable as the annual payments he would have been required to pay, had he not availed himself of the 9th section of the ordinance, is not shown. There was a necessity for the present payment of a portion of the sewer debt, otherwise the ordinance would not have been passed. Whether the benefit derived thereby would exceed the difference between a tax on the property of Lucas, as improved and unimproved, we have no means of determining. A large municipal body, entrusted with the execution of a power, must be allowed some discretion in the choice of means, unless it appears that it was plainly intended to confine it to a prescribed mode. The provision that the tax should be annually levied could not have been designed to prevent the city from accepting a present sum, for the annual assessments, as they would become due. If the operation of the 9th section of the ordinance had been beneficial in all the other districts of the city, would it be void, merely because, in a single instance, it had been advantageous to an individual?

The case, as stated, does not show that the plaintiff has sustained any injury, nor does it appear that he will sustain any by the collection of the sewer tax for 1852. Lucas paid a sum of money into the city treasury as an equivalent for the yearly assessment that would have been due by him to the sewer district. If that sum be distributed among the years that have passed, including 1852, and his real estate be assessed at its improved value, it will not appear but that, of the sum paid there is enough left to satisfy his sewer tax for 1852. The

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money of Lucas for the tax is in the city treasury. Now if he is as yet in advance of all other tax payers, until he actually falls behind, they have no cause to complain. But if Lucas should be in arrear, does it follow that the plaintiff would have a right to arrest the collection of the tax due by him. He is not assessed to a greater amount than the city had authority to impose. The 9th section of the ordinance may be void, and all the rest of it valid. One section of a law may be unconstitutional, while all the remaining sections will be enforced. The petition can only be sustained, on the principle that the passage of an ordinance in violation of a city charter would give to its citizens a right to arrest all its proceedings—to suspend the exercise of its franchise. This is not law. The right of a corporation *de facto* will be enforced. It is no defence to the claim of a corporation, that it has violated its charter.

The other judges concurring, the judgment will be reversed, and the petition dismissed.

CHRISTY'S ADMINISTRATOR, Appellant, *vs.* THE CITY OF ST. LOUIS, Respondent.

1. Walker v. The City of St. Louis, 15 Mo. Rep. 563, affirmed.
2. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back, on the ground that the city has no capacity to take money which it has no right by charter to demand.
3. The same principle applies to an administrator who voluntarily pays illegal taxes upon the estate of his intestate, as to a person acting for himself. Neither can maintain an action to recover back.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by the administrator of William Christy to recover back taxes paid by him and a preceding administrator to the city of St. Louis, beyond one-sixteenth of one per cent. per annum, upon real estate of their intestate,

situate in what was known as the new limits, brought into the city by the charter of 1841. The facts are the same as in the case of *Walker v. The City of St. Louis*, 15 Mo. Rep. 563. The court below gave judgment for the defendant, from which the plaintiff appealed. The cause was submitted on written arguments by Mr. Reynolds for appellant, and Mr. Dayton and Mr. Gantt for respondent.

Mr. Reynolds, for appellant, argued the following points :
 1. The city of St. Louis has no capacity to receive or retain money for taxes not authorized by its charter. One paying, under a mistake of law, money to a natural person, may not recover it back, as there is in him the legal and natural capacity to give, and in the person paid, a legal and natural capacity to take. But a corporation has no natural capacity to take, and its legal capacity to take and hold is to be judged of by its charter. (First Inst. 263, a, 264; b. 1 Thomas' Coke, p. 193-4. As to the capacity to take real estate: *Jackson v. Hartwell*, 8 Johns. 422. *First Parish in Sutton v. Cole*, 3 Pick. 232. *Weston v. Hunt*, 2 Mass. 502. *Lumbard v. Aldrich*, 6 N. H. 269. *Lessee of Knowles v. Beatty*, 1 McLean, 41. *Green v. Seymour*, 3 Sandf. Ch. Rep. 285. *Beatty v. Lessee of Knowles*, 4 Peters, 152. As to personal estate: *State v. Granville Alexandria Society*, 11 Ohio, 1. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559. *Bangor Boom Corporation v. Whiting*, 29 Maine (16 Shepley,) 123. *Farmers' Loan & Trust Co. v. Canal*, 5 Barb. Sup. O. Rep. 613. *McCullough v. Moss*, 5 Denio, 567.) But as the city has the physical and legal capacity to have the custody of money thus put into its coffers, the law will imply a promise and impose an obligation to refund. (*Stone v. Berkshire Cong. Society*, 14 Vermont, 86. *Bates v. State Bank*, 2 Ala. 451. *Thayer v. Boston*, 19 Pick. 511. *Garrett v. Andover*, 21 Vermont, 343. 5 Barb. Sup. O. Rep. 79.)
 2. The money paid to the city by Christy's administrators was a trust fund, which may be followed into the hands of any one receiving it with a knowledge of its misapplication. This

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whole transaction was a *devastavit*. If the present administrator cannot recover back the taxes paid by himself, he can at least those paid by the former administrator. (Story's Eq. Jurisp. §1257 and authorities there cited. *Clark v. Hougham*, 2 B. & C. 149.) 3. The ordinance being void in part is void *in toto*, and plaintiff should recover back the whole tax. (5 Barbour's S. C. Rep. 613. *Ashville v. Means*, 7 Iredell, 406. *Drew v. Davis*, 10 Verm. 506. *Huse v. Merriam*, 2 Greenleaf, 375. *Elwell v. Shaw*, 1 id. 339. *Stetson v. Kempton*, 13 Mass. 272. *Bangs v. Snow*, 1 Mass. 181. *Dillingham v. Snow*, 5 Mass. 547. *Libby v. Burnham*, 15 Mass. 144.)

Mr. Dayton and Mr. Gantt, for respondent, relied upon *Walker v. The City*, 15 Mo. Rep. 563, and cited the following additional authorities: *Smith v. Readfield*, 27 Maine, 145. *Hemingway v. Machias*, 33 Maine, 445.

SCOTT, Judge, delivered the opinion of the court.

This action is founded on the state of facts that existed in the case of *Walker v. The City of St. Louis*, 15 Mo. Rep. 563, and grows out of the acts of the city, therein detailed.

The argument addressed to the court, founded on the incapacity of the city, as a corporation, to take and retain the money, the subject of this suit, is unsupported by authority, as by the common law, corporations, as an incident, possess the power to take and hold property, real and personal. The mortmain acts, if they are in force here, will not affect this question, as they do not extend to personalty. Restraints on this incident of corporations may be imposed by the express words of their charters, or by implication, but there is nothing in the charter of the city of St. Louis that can affect this question. Nor is the point in the case affected by the consideration, that the money was paid by an administrator. No reason can be perceived, why the case of an administrator should be different from that of any other individual. Under the circumstances,

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it would hardly be maintained, that he committed a *devastavit* in paying the taxes demanded by the city.

It cannot be disguised that the question involved in this controversy has received different determinations in the courts of the states of the Union. The view entertained by this court, when the point was presented in the case of *Walker v. The City of St. Louis*, derives confirmation from the cases of *Hemmingway v. Machias*, 33 Maine Rep. 445, and *Smith v. Redfield*, 27 Maine Rep.

The other judges concurring, the judgment is affirmed.

CALVERT, Respondent, vs. RIDER & ALLEN, Appellants.

1. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section.
2. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass.

Appeal from St. Louis Court of Common Pleas.

This was an action against Rider, the master, and Allen, the clerk, of the steamboat *Timoleon*, to recover damages for a trespass in transporting a slave of the plaintiff out of the state of Missouri, whereby the slave was lost.

The cause was submitted upon the following agreed facts: In the fall of 1849, the plaintiff's slave came on board the steamboat, took passage for some point on the Illinois river, paid his passage money to Allen, the clerk, and went up the river on the boat to the point of his destination. Both Rider, the master, and Allen, the clerk, knew that the slave was going on the boat. Before this suit was begun, the plaintiff brought

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a suit *in rem* against the steamboat for taking the slave, and recovered judgment for his value, which had been satisfied.

Upon these facts, the court below gave judgment for the plaintiff for the value of the slave, from which defendants appealed.

Mr. *Shepley*, for appellants, relied upon these points: 1. The recovery and satisfaction in the suit of the same plaintiff against the steamboat *Timoleon*, is a bar to this action. The statute is a penal one, and is to be construed strictly. The words, "without prejudice to any right of action at common law" must be construed as merely intended to give the owner of the slave a choice of remedies. 2. If even a recovery can be had in this case against *Rider*, the master, *Allen*, the clerk, is not liable either by the statute or at common law. It is the business of the master, not of the clerk, to decide who is to go on a boat.

A. H. Buckner, Glover & Richardson, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The principle question discussed in this case is, whether the owner of a slave, after he has recovered judgment and obtained satisfaction, in an action against a steamboat for the transportation of his slave out of the state, can maintain an action at common law against those who were concerned in removing the slave from the state.

The 31st section of the act concerning slaves, (R. C. 1845, p. 1018,) gives to the owner of a slave transported out of the state, or from one point to another, within the state, on board of any boat or vessel, a right to sue the master, commander or owner of the vessel, in an action of debt. The section declares that the master, commander or owner "shall forfeit and pay the value of such slave to his owner, to be recovered by action of debt, without prejudice to the right of such owner to his action at common law."

The 32d section provides that any boat or vessel used in

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navigating the waters of this state, whose master, owner or commander shall violate the preceding section, shall be liable to the same extent that such master, owner or commander is, and then gives the means of redress under the act concerning boats and vessels, "without prejudice to any right of action at common law."

The plaintiff has recovered judgment against the steamboat *Timoleon* for the value of his slave, and sues in this action at common law again to recover the value.

The statute, in each of the sections, imposes a penalty; in the 31st, on the master or owner; in the 32d, on the boat. The recovery and satisfaction of either of these penalties, under either section, will bar the recovery of the penalty under the other. But the recovery and satisfaction, under either section, is no bar to the recovery in a common law action of trespass; for the statute so declares. The measure of recovery, under either section of the statute, is the value of the slave, although his owner may have retaken him without much expense or loss of time. The recovery in the action at common law is to be for the damages sustained by the wrongful act in taking the slave away, and in flagrant cases of wrong, such smart money as may be reasonable. The statute was designed to make those who are engaged in the navigation of the waters of our state, and who have peculiar facilities for removing slaves, liable for a penalty for such removal in their vessels; while they remain liable, in common with all other persons, for damages occasioned by trespasses. The recovery against the steamboat was no bar to the recovery against those who committed the trespass.

2. It is insisted that, as the defendant, Allen, was only clerk of the boat, and only received the passage money from the slave for taking him to some point in Illinois, he is not liable to this action. But if a trespass was committed by taking away the property of the plaintiff, it would appear to be proof of very clear assent to the act of trespass, that he should receive the pay for doing the act. At least, without some evi-

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dence showing that he was under some compulsion, the conclusion is altogether proper, that he assented and thereby became liable as a trespasser. The judgment is, with the concurrence of the other judges, affirmed.

THE CITY OF ST. LOUIS, Respondent, vs. SHANDS, Appellant.

1. Under ordinance No. 3037 of the city of St. Louis, approved July 29, 1853, supplementary to ordinance No. 2952, approved January 7, 1853, flour manufactured in the city was not required to be submitted for inspection before sale.

Appeal from St. Louis Criminal Court.

C. G. Mauro and E. W. Shands, for appellant.

Joseph Jecko, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The city council of the city of St. Louis passed an ordinance which was approved January 7, 1853, by which the third article of an ordinance, No. 2381, "establishing and regulating the inspection department," was repealed, and the following provisions adopted in lieu thereof:

[No. 2952.]

SEC. 1. It shall be the duty of the inspector of flour to weigh, inspect and determine the quality, according to the grade herein established, of all flour brought to the city of St. Louis, by steamboats, keel boats, flat boats, wagons or otherwise, and which is not to be shipped beyond the limits of the city. He shall brand all barrels and half barrels inspected by him, with the grade to which they belong, and the weight thereof; to register, in suitable books, all inspections made, with the date and number, and quality of the barrels and half barrels.

SEC. 2. The following grades of flour, offered for sale within the city, are hereby established, and the inspector shall brand each barrel or half barrel, according to the grade to which it belongs: First, flour of the first quality shall be styled "extra superfine;" second, flour of the second quality shall be styled "fancy or superfine;" third, flour of the third quality shall be styled "fine;" fourth, flour of the fourth quality shall be styled "middlings;" fifth, flour below the fourth quality, shall be styled "ship stuff."

SEC. 3. Every barrel, containing flour offered for sale within the city, shall be made of good, seasoned timber, and shall be hooped with ten round, or six flat hoops, with at least four nails in each chime hoop, and three in each bilge hoop. The staves of a whole barrel shall be twenty-seven inches long, diameter of the head seventeen inches; the staves of a half barrel shall be twenty-two inches long, and the diameter of the head thirteen inches; each whole barrel shall contain one hundred and ninety-six pounds of flour, and each half barrel ninety-eight pounds of flour.

SEC. 4. Every manufacturer of flour shall brand or mark one head of each barrel with the name in full of the mill at which it was manufactured, or with the name of the manufacturer, and the tare or weight of the barrel; and said brand or mark shall be put on with paint, in a durable manner, so as not to be easily defaced; and any barrel or half barrel made as aforesaid, the dimensions being as aforesaid, and marked or branded as aforesaid, shall be deemed "merchantable."

SEC. 5. The inspector shall not brand any barrel or half barrel not "merchantable" as aforesaid; provided, however, if the owner or agent shall make such barrel or half barrel "merchantable," then he shall brand the same.

SEC. 6. The inspector, in his inspection, shall use a barrel auger not exceeding seven-eighths of an inch in diameter, with which he may bore into each barrel not more than twice, to satisfy himself of the quality of the flour.

SEC. 7. The inspector shall brand upon the head of each

barrel or half barrel by him inspected, in a legible manner, the quality of the flour, the weight thereof, with "Inspected, St. Louis, Mo."

SEC. 8. Whoever, in this city, shall submit for inspection or sale, or sell or offer for sale, any flour in barrels or half barrels, in which there is a mixture of corn meal or other substance, or shall sell or offer for sale any barrel or half barrel of flour, wherein the quantity of flour is less than hereinbefore required, shall forfeit and pay not less than fifty cents nor more than five dollars for each and every barrel or half barrel presented for inspection, sold or offered for sale.

Approved January 7, 1853.

This ordinance failed to make the selling of flour, without first causing it to be inspected, an offence. To remedy this, a supplementary ordinance (No. 3037) was passed, approved July 29, 1853. The first section of this last ordinance declares, "that whoever, in this city, shall sell or offer for sale any flour, in barrels or half barrels, without the same being first submitted for inspection, as provided in the ordinance of which this is amendatory, shall forfeit and pay to the city fifty cents for each and every barrel and half barrel so sold or offered for sale, on conviction before the recorder."

The first section of ordinance No. 2952 makes it the duty of the inspector of flour to weigh, inspect and determine the quality, according to the grade established by that ordinance, "of all flour brought to the city of St. Louis by steamboats, keel boats, flat boats, wagons or otherwise, and which is not to be shipped beyond the limits of the city."

In this case, the following statement of facts, agreed upon by the parties, was submitted to the court below :

"It is agreed between the parties, plaintiff and defendant, that defendant is a miller, manufacturing flour in St. Louis city ; that defendant sold two barrels of flour manufactured by him in St. Louis city for consumption in said city, without having the same inspected." Upon this state of the facts,

the court found for the plaintiff, and gave judgment accordingly.

1. In the opinion of this court, the facts, as agreed upon, do not warrant the judgment of the court below. There being in the ordinance No. 2952 no requisition on the owners to submit their flour for inspection, no penalty for failing to submit it for inspection, no penalty for selling or offering to sell it, the supplementary ordinance was passed. This requires the flour to be submitted for inspection, as provided in the ordinance No. 2952. Now this supplementary ordinance must be looked to and considered as part of ordinance No. 2952, and then we shall see what flour is to be inspected. "All flour brought to the city by steamboats," &c., which is not to be shipped beyond the limits of the city. The ordinance No. 2952 required duties to be performed by the inspector, but omitted to require duties of the owners, which were necessary to the performance of those on the part of the inspector. Now the question occurs, what flour must the owners submit to inspection? The answer is, such only as is required by ordinance No. 2952. That requires of the inspector that he shall inspect certain flour; that is, flour in barrels or half barrels, *brought to the city by certain modes*. It does not embrace flour manufactured in the city, nor do we think the supplementary ordinance can be properly construed to embrace it. Whoever shall sell any flour, the inspection of which is provided for in ordinance No. 2952, without having it inspected, becomes liable to the penalty. We must, therefore, see what flour was to be inspected under the ordinance No. 2952, before we can inflict the penalty.

There can be no doubt that the agreed statement of facts does not include flour brought to the city; and it is equally as clear, that flour manufactured in the city was not designed to be included in ordinance No. 2952.

The judgment of the court below is erroneous. It should have been for the defendant. It is therefore, with the concurrence of the other judges, reversed.

Moore v. Otis.

MOORE, Defendant in Error, *vs.* OTIS, Plaintiff in Error.

1. Suit by attachment on a note given by B. F. O. & Co., was commenced before a justice against B. F. O. & — O. The affidavit alleged that B. F. O. & — O. (composing the firm of B. F. O. & Co.,) were non-residents. The firm of B. F. O. & Co. was really composed of B. F. O. & R. S. Upon appeal to the circuit court, the suit was dismissed as to — O. Before or after this dismissal, (it did not appear which,) a plea in abatement was filed, denying the non-residence of B. F. O. & — O. *Held*, the only issue to be tried upon the plea was, whether B. F. O. was a non-resident.

Error to St. Louis Circuit Court.

The case is stated in the opinion. The following instruction asked for the defendant was refused: "If the jury shall believe from the evidence that, at the time of the execution of the note sued upon, and the issuing of the attachment process, Benjamin F. Otis and Robert Scott alone composed the firm of B. F. Otis & Co., and not B. F. Otis & — Otis, as is alleged in the affidavit upon which the attachment was sued out, and that, at the time of the execution of said note and ever since, the said Robert Scott has been a resident of, and resided and still resides in the state of Missouri, they ought to find for defendant on the plea in the nature of a plea in abatement, notwithstanding the jury may believe that said Benjamin F. Otis was, at said time, a resident of Boston, Massachusetts." There was evidence that B. F. Otis and Robert Scott were partners in business, and had a house both in Boston and St. Louis. The style of the house in Boston was B. F. Otis & Co., and in St. Louis, Scott & Otis. Otis resided in Boston and Scott in St. Louis. It did not appear from the record, whether the attachment was levied upon partnership property or not.

Hart & Jecko, for plaintiff in error.

C. Harding, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This suit was commenced before Mann Butler, Esq., a justice of the peace, in August, 1850. An attachment was issued;

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affidavit being made by Chester Harding, Jr. The suit was originally against B. F. Otis & ——— Otis. The affidavit on which the attachment issued was as follows: "Chester Harding, Jr., being duly sworn, upon his oath says, that Benjamin F. Otis and ——— Otis, (composing the firm of B. F. Otis & Co.,) are justly indebted to John E. Moore, after allowing, &c., in the sum of one hundred and forty-eight dollars and twenty cents, on account of a promissory note made by said B. F. Otis & Co., and this affiant has good reason to believe and does verily believe, that said Benjamin F. Otis and ——— Otis are not residents of nor residing in the state of Missouri."

After notices were given, the defendants not having been served with process, judgment by default was rendered on the 14th of September, 1850. A motion was made by defendant on 17th September, 1850, to set aside the judgment by default; it was overruled, and an appeal was granted to the Circuit Court.

At November term, 1853, of the Circuit Court, the plaintiff, by his attorney, moved for leave to dismiss his suit as to ——— Otis; this motion was sustained, and the cause was, by order of the court, dismissed as to ——— Otis. Afterwards, a trial was had on the issue made by the plea in the nature of a plea in abatement, denying the non-residence of B. F. Otis and ——— Otis.

I cannot find from the record of this case, now before me, whether the plea in the nature of a plea in abatement was filed, denying the non-residence of B. F. Otis and ——— Otis, before the plaintiff had leave to dismiss as to ——— Otis, or afterwards.

The cause alleged in the affidavit on which the attachment issued, was the non-residence of B. F. Otis and ——— Otis, the defendants in the suit. This non-residence was denied by the plea putting in issue the truth of the affidavit. The suit being dismissed as to ——— Otis, left the issue then to be tried in regard to the non-residence of B. F. Otis alone. This being the case, the instruction given by the court, that "The only question for the jury to determine is, whether Benjamin

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F. Otis was, at the date of the attachment, a resident of or residing within the state of Missouri; if the jury believe from the evidence, that he was not a resident of nor residing in this state, they will find for the plaintiff upon the issue joined on the plea in abatement," was legal and proper from the evidence in the case preserved by the bill of exceptions.

It would have been improper to have given the instruction prayed for by the defendant, in respect to Robert Scott being a partner in the firm of B. F. Otis & Co., and not ——— Otis. Robert Scott was not mentioned in the affidavit, and from all that appears, was not known as a partner of B. F. Otis & Co. However this may be, when the suit was dismissed as to ——— Otis, it left B. F. Otis alone the defendant. The affidavit then may be considered as putting in issue alone his residence or non-residence; and the residence of Robert Scott was foreign to this issue, and the instruction in regard to it properly refused.

The judgment of the court below is affirmed, with the concurrence of the other judges.

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THOMPSON & WIFE, Appellants, vs. LYON *et al.*, Respondents.

1. An infant cannot execute a power of appointment coupled with an interest.
2. The disability of infancy cannot be dispensed with by the instrument creating the power.
3. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment.
4. A court of equity, however, will not, in such a case, interfere against a purchaser for a valuable consideration without notice.

Appeal from St. Louis Court of Common Pleas.

The case is stated in the opinion of the court.

Glover & Richardson and *B. Bates*, for appellants, relied upon the following points: 1. An infant cannot execute a

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power coupled with an interest, though it is otherwise with a naked power. (4 Kent, 316, 324. 1 Sug. on Powers, 213; (13 Law Lib. 114, 116.) Macpherson on Infancy, 39 Law Lib. 302. 3 Atk. 710. 1 Chance on Powers, 222, §587.) 2. Nor is the disability of infancy dispensed with in the present case, by the words used in the instrument creating the power. The remarks of Chance, in his work on Powers (§583,) and of Preston, in his treatise on Abstracts (p. 326) to the effect that the disability of infancy may be dispensed with, and that the words "at any time hereafter," in the clause conferring the power, would be sufficient for that purpose, are not sustained by any adjudicated case, and the doctrine is denied by Kent, Sugden and Macpherson. The law, for wise purposes, declares that an infant is incompetent to convey his own property, and no person short of the supreme power of the state can emancipate him from this disability. (*Simson v. Jones*, 2 Russ. & Mylne, 365, 13 Eng. Cond. Ch. Rep. 82.) It is said that a party ought to be permitted to dispose of his property on his own terms. So he may. He may confer upon an infant power to convey his land. But he cannot convey his land to a trustee for an infant beneficiary, and then authorize the infant to dispose of it in violation of the law established for his protection. If a deed is made with a void condition, the grant may be good and the condition void. 3. If the power existed, it had to be executed strictly, and this was not done, because Mrs. Thompson did not direct the trustee in writing to whom he should convey.

Shepley, for respondents. 1. In the deed from Collins and wife to Foster, as trustee for Virginia M. Wetherell, the statute did not execute the use, and the legal title was in Foster, the trustee, for, 1. It was a deed of *bargain and sale*, in which the first use was executed in the bargainee. (*Cary v. Jackson*, 16 Johns. Rep. 304. *Guest v. Farley*, 19 Mo. R. 147.) 2. It is not executed because the conveyance is to the *separate use of a married woman*. (Hill on Trustees, 234. Lewin on Trusts, 103. *Ayer v. Ayer*, 16 Pick. 330. 1

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Hilliard on Real Prop. 300. 12 Ohio, 287. 4 Paige, 403. 4 Ad. & El. 582.) 3. It is not executed because the trustee is required *to convey*. (Hill on Trustees, 324. *Garth v. Baldwin*, 2 Vesey, 645. *Edmondson and wife v. Dyson*, 2 Kelly, 307. 7 Vesey, 201. 4 Ad. & E. 582.) II. The legal estate then was in Foster, the trustee, to hold for Virginia Wetherell's separate use, and to be conveyed by Foster *at any time thereafter* at her request, and to whom she should direct; and said Foster having conveyed at her request, the conveyance is good, though she was a minor *feme covert* at the time. There is no controversy as to the power of an infant to execute a mere naked power. The only question is in the case where the infant is the beneficial owner, and, as far as can be found, this question has arisen *only* in cases where no power has been given in the deed, either expressly or by implication, to execute during minority. It would seem, upon principle, that a grantor can convey an estate with such limitations and conditions as he may be pleased to annex to it, so long as he does not contravene the settled rules of law, as to the creating of perpetuities. (See Bingham on Infancy, p. 277.) It is admitted on all hands that, where an estate is held by trustees, to be conveyed as a *married woman* may direct, a conveyance made under her direction, her husband not joining, will pass a perfect title. Now how can this be supported, unless it is derived from the power contained in the grant itself. The incapacity of a married woman is greater than that of an infant. Her conveyance is absolutely void, and an infant's only voidable. So far as authority is concerned, it is not even settled whether, in a grant where neither by express words nor by implication authority is given to execute a power coupled with an interest by an infant under age, that power can be exercised. (See case of *Hollingshead v. Hollingshead*, quoted in *Coventry v. Coventry*, 2 P. Williams, 228.) The case of *Hearle v. Greenbank*, (3 Atk. 696,) will be found to have been decided upon the ground that, in the will in that case, no power to execute during infancy was given expressly, nor could be

inferred from its provisions. Both these cases were decided at a time when the courts held that deeds made by infants were absolutely *void*. All the late writers hold that an infant may execute a power coupled with an interest, if his infancy be dispensed with, or if, from the nature of the power, it be evident that it was in the contemplation of the author of the power that it should be exercised during minority. (1 Preston on Abstracts, 326. 1 Chance on Powers, 216 to 225. Macpherson on Infants, 458. See also 3 Henn. & Munf. 399.) The deed in this case clearly shows the intention of the donor of the power that it should be executed during minority. The words are "*at any time hereafter.*" (1 Chance on Powers, 583.) III. By the deed of Foster, the trustee, to Hubbard, the legal title passed, and if, on account of her being a minor, she be not absolutely bound by the appointment made in that deed, yet as the act is voidable and she has slept on her rights for about sixteen years after she came of age, she can have no relief in a court of equity. (2 Story's Eq. §742, 769, 771. 8 B. Monroe, 162.) IV. As the equitable estate created by the deed to her trustee was her separate property, her coverture does not prevent her laches from barring her recovery. (11 Paige, 475. 10 Mo. Rep. 757.) The disabilities are to be separately considered; one cannot assist the other. (1 Shep. 397. 3 Brevard, 286. 11 Humph. 468.)

SCOTT, Judge, delivered the opinion of the court.

This was an action to set aside a deed, and to recover possession of two lots on Collins street, in the city of St. Louis, brought in May, 1851. The respondents, who are the defendants, claim title to the premises in controversy, under a deed from Wm. P. Foster and his daughter, Virginia Wetherell, who afterwards intermarried with Wm. F. Thompson, one of the plaintiffs.

In July, 1829, Charles Collins and wife conveyed the premises in dispute to Wm. P. Foster, for the consideration of

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\$700, in trust for his daughter, Virginia Wetherell, who was then a minor, and to no other. This deed was subject to the following proviso, viz: "That it shall and may be lawful to and for the said Wm. P. Foster, the trustee aforesaid, at any time hereafter, upon the request of her, the said Virginia W. Wetherell, to release, assign and convey the whole or any part of the premises herein described to such person or persons as she shall designate or appoint, and to such use or uses as she shall or may think fit or expedient. John W. Wetherell, the husband of Virginia Wetherell, died during the year 1831. On the 7th day of June, 1831, Wm. P. Foster and his daughter, Virginia Wetherell, who was still a minor, joined in a deed and conveyed the lots in dispute to Russell Hubbard, for \$132 53, which lots, by subsequent conveyances, passed to the respondents. In the year 1834, Virginia Wetherell intermarried with Wm. F. Thompson, who, in conjunction with his wife, brings this suit, on the ground of her infancy when she executed the deed to Russell Hubbard.

On these facts, there was a judgment for the defendants.

Nothing is said in relation to the title derived from the execution on Neville's judgment against John W. Wetherell, because there is no fact found, which shows that the consideration of the deed from Collins and wife to Foster, in trust for Virginia Wetherell, proceeded from her husband.

✓The defendants seek a support to the conveyance made by Virginia Wetherell during her infancy in the words of the proviso, which empowered the trustee, at any time thereafter, upon her request, to convey the premises. The *dicta* in some of the books, which maintain that an infant may make an appointment to uses of trust estates, where such authority is conferred by express terms in the deed creating the trust, do not seem to be supported by any decided case. The case of *Hollingshead v. Hollingshead*, in Gilbert's Equity Reports, where an infant, having covenanted to settle his estate on marriage, according to a power vested in him, but having died before full age, the remainderman was compelled to perform the covenant,

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has been called an idle one and not law. (Bing. 81.) Sir Edward Sugden has remarked, in reference to the opinion that an infant might exercise a power not simply collateral, given by express words during infancy, that it would be a bold decision that an infant may have a power of disposition over an estate through the medium of the statute of uses. Before the statute, it is clear that an infant could not alien a use limited to him, that is, could not direct his trustees to convey the estate to a third person. In that respect, equity followed the law. Now the statute only operates on what were uses at the time it passed. A power not simply collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant cannot give by reason of his nonage. (Sugden on Powers, 216. Macpherson on Infancy, 302. 4 Kent, 324.) A beneficial power, being in the nature of property, which an infant cannot by law alienate, it would be strange that an incapacity which the law imposed should be evaded, by means of a power conferred by an individual. A right to bestow on infants property, with an absolute power of disposal, would enable third persons to destroy that control with which the law has wisely entrusted parents over their minor children. Minors would become adults, as there would be no danger of loss in contracting with them.

✓ The statute of limitations is no bar to the plaintiff's right of recovery. Although the disabilities enumerated in the statute are not cumulative, yet, as Virginia Wetherell was under age when she executed the conveyance in 1831, her right of action accrued immediately thereon; consequently, she had twenty years from her majority, within which to bring her action, as a provision of the act of limitations of 1835, still in force, expressly declared that actions theretofore accruing should be governed by the statute in force at the time they accrued. The act of 1825 was in force in 1831, and allowed infants twenty years within which to bring their actions after their disabilities were removed.

As this judgment will be reversed and the cause remanded,

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with leave to amend the answer, we will state that, had it appeared from the facts in the case, that the defendants were purchasers for a valuable consideration, without notice, they would have been protected in their possession against the claim of the plaintiffs. Virginia Wetherell had nothing but an equity in the disputed premises, and if, by her conduct, she has been the means of that equity passing to a purchaser for a valuable consideration without notice, her infancy cannot avail her. We are here dealing with equitable rights. It is an inflexible rule of equity jurisprudence to grant no relief against a purchaser for a valuable consideration without notice. Virginia Wetherell is seeking equity through the medium of a procedure in the nature of a bill in equity, and she must submit to the rules of equity courts. Could she sue at law, or in other words, was her title a legal one, her claim could not be resisted. Her incapacity to make the conveyance would be fatal to the defendants' cause. There is a similar incapacity to dispose of her rights in equity; but having disposed of them, and adopting a proceeding in the nature of a bill in equity, she must submit to the rules of a court of equity. The modification of our rules of pleading, and the blending of law and equity, does not destroy the equitable rights of parties.

The same learned lawyer, whose authority has settled the first question which was made in this cause, says that a court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man, who has purchased, for a valuable consideration, *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity. Precedents are numerous and ancient where the court has refused to give any assistance against a purchaser, either to an heir or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another. (2 Sug. Ven. 295.) So he says, if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age. (Id.

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300.) The judgment will be reversed, and the cause remanded, with leave to the defendants to amend. Judge Ryland concurring. Judge Gamble not sitting.

BARADA, Appellant, vs. BLUMENTHAL, Respondent.

1. It is settled that no claim was confirmed by the act of June 13, 1812, which had been previously abandoned.
2. By abandonment of a lot is meant quitting possession, with the intention that it should no longer be the property of the possessor.
3. Where there is evidence of abandonment, an instruction which leaves that question out of view, is properly refused.
4. The fact that the claimant of a lot applied for and obtained in 1808, the benefit of an act for the relief of insolvent debtors, and did not include the lot in his inventory, which was required to be sworn to as a full and perfect discovery of all his real and personal estate, together with the fact that he had previously removed the machinery of a mill which he had erected upon it, and the occupation of which had been his only possession or evidence of title, is evidence to go to a jury of an abandonment.

Appeal from St. Louis Court of Common Pleas.

This was an action for the possession of a lot in Carondelet, claimed to have been inhabited, cultivated and possessed by Gregoire Sarpy, prior to December 20, 1803, and confirmed by the act of congress of June 13, 1812. The plaintiff claimed under a deed from the heirs of Gregoire Sarpy.

The defendant claimed under a confirmation by the act of congress of April 29, 1816, to the legal representatives of Joseph Boisvert, to whom the land was conceded on the 4th of July, 1774, by Pedro Piernas, the lieutenant governor of Upper Louisiana. The derivative title of the defendant, under this latter confirmation, was admitted.

At the trial, there was oral evidence tending to show that, many years prior to 1803, Gregoire Sarpy erected a mill upon the lot in controversy, which was used for grinding corn and wheat; that Sarpy did not live in Carondelet, but the mill was run

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by his agent ; and that shortly after the change of government, the machinery of the mill was by him removed to St. Louis.

The defendant read in evidence the proceedings on the application of Gregoire Sarpy for the benefit of the act of October 16th, 1807, concerning "insolvent debtors." The application was dated January 11, 1808, and accompanied with an inventory, to which was annexed an affidavit that it contained, to the best of the applicant's knowledge, remembrance and belief, a full, just, true and perfect account and discovery of all his real and personal estate and effects. The lot in controversy was not mentioned in said inventory. The plaintiff objected to this evidence, but his objection was overruled.

The plaintiff asked the following instruction, which was refused :

"If the lot in controversy is a town or village lot, within the town or village of Carondelet, as the same existed prior to the 20th of December, 1803, and was inhabited, possessed or cultivated by Gregoire Sarpy, or his agent or tenant, prior to said 20th of December, 1803, such inhabitation, cultivation or possession vested in said Sarpy the lawful title to said lot in fee simple, by operation of the act of congress passed on the 13th day of June, 1812, entitled "An act making further provision for settling the claims to land in the territory of Missouri."

The court gave the following instruction, among others :

"If the jury believe from the evidence that, prior to December 20, 1803, Gregoire Sarpy inhabited, possessed or cultivated the lot in question, either by himself, his agent or tenant, and that the same was a town or village lot, and was within the town or village of Carondelet, as the same existed prior to December 20, 1803, then the title to the same was vested in said Sarpy by the act of June 13, 1812, unless prior to said June 13, the said Sarpy had abandoned the same, or disclaimed all right, title or claim thereto. By abandonment, is meant the quitting of the possession of the lot, with the intention that it should be no longer the property of the possessor."

Other instructions asked by the defendant were refused. There was a verdict and judgment for the defendant, from which the plaintiff appealed. The case was orally argued by Mr. E. Casselberry, for appellant, and by Mr. F. A. Dick, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

As the plaintiff claimed title to the lot in question, upon the ground that it was confirmed to Gregoire Sarpy by the act of congress of June 13th, 1812, and conveyed by Sarpy's heirs to him, it was properly made a matter of defence that Sarpy had, previous to the passage of that act, abandoned the property, and that he then had no subsisting claim thereto. (*Lajoie v. Primm*, 3 Mo. Rep. 368. *Page v. Scheibel*, 11 Mo. Rep. 183.)

As there was evidence of the fact of abandonment by Sarpy, the court correctly refused to give the instruction asked by the plaintiff, which asserted that the title of Sarpy was confirmed by the act of 1812, if he possessed the lot prior to 20th December, 1803, thus throwing out of consideration the question made in the defence, that Sarpy had abandoned all claim to the lot prior to the passage of the act of 1812.

The first instruction given by the court correctly placed before the jury the law applicable to the plaintiff's case, and correctly defined abandonment, as that definition is given in the *Partidas*.

The fact that Sarpy, in 1808, applied for and obtained the benefit of the act for the relief of insolvent debtors, (1 Terr. Laws, 181,) and that, in his inventory, he did not include this property, coupled with the fact that he had previously removed from it the machinery of the mill which he had erected upon it, and the occupation of which was his only possession of the lot, was evidence of abandonment, entitled to great weight.

The obligation upon a debtor applying for the benefit of the insolvent law to include in his inventory all his property of every description, when he is required to swear to its being a

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full, true, just and perfect account and discovery of all the estate and effects in any wise belonging to him, is as strong as it can be made. Although the title to a lot not mentioned in the inventory was not conveyed to the sheriff by the deed which the act required to be executed, and was not divested by the act itself, still, when a jury is considering the question whether the insolvent debtor had, at the time, a subsisting claim to a lot which is not mentioned in his inventory, its omission is strong evidence that he did not claim it. Sarpy had no paper title; he had had possession before the change of government, by erecting and running a mill upon the lot; he quit the occupancy of the lot, and removed the machinery of his mill to St. Louis; afterwards, he made his inventory as an insolvent, and did not mention the lot as his property; the proceeding under the insolvent act was in 1808; the question in the case was, whether he had a subsisting claim to the lot in 1812, which was confirmed by the act of 13th June. The instructions were not stronger than the evidence justified. The judgment is, with the concurrence of the other judges, affirmed.

THE STATE, AT THE RELATION OF THE JUSTICES OF WASHINGTON COUNTY COURT, Appellant, *vs.* PREWETT *et al.*, Respondents.

1. A court will not interfere to establish the validity of a charity in a will, depending upon a contingency which has not arisen and may never arise.

Appeal from Washington Circuit Court.

In 1851, Gabriel Prewett died, leaving a last will, by which he devised all his land to his wife for her life, and after her death, to her children, if she should have any. If she should die without children, then he desired all his land to be "sold to the best advantage, and appropriated to the use of education of orphan children." He specified as one of the tracts belonging to him eighty acres entered in the name of his wife.

The present petition was filed in the Circuit Court in the name of the state of Missouri, at the relation of the justices of the county court, against the widow, son and administrator of Gabriel Prewett, setting forth that it was the duty of the relators to watch over the welfare of orphan children within their county, and praying the court to establish the devise for the benefit of such children as a charity. The petition further set forth that the widow was claiming the eighty acres entered in her name, as her own; and that she was "a very young and healthy woman," and might "live half a century;" for which reason the relator prayed the court to hear the proof while it could be obtained, and declare that the said tract belonged to Gabriel Prewett's estate. The petition contained other prayers which it is not necessary to state. A demurrer to this petition being sustained below, the relators appealed to this court.

J. W. Nbell, for appellant.

M. Frissell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

As the will of Gabriel Prewett only directed his land to be sold for the education of orphan children, in the event of his wife dying without children, and as his wife is now living, no ground can be perceived on which this petition can be sustained. The contingency has not yet arisen, and never may arise, on the happening of which a right to the charity will accrue. The wife is represented as a very young and healthy woman, and as one that may yet live for half a century.

The other judges concurring, the judgment will be affirmed.

SMITH, Appellant, *vs.* SMITH, Respondent.

1. The provision in the act regulating practice in chancery, (R. C. 1845,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree for a divorce. (SCOTT, J., dissenting.)

Appeal from St. Louis Circuit Court.

The case is sufficiently stated in the opinion of the court. It was argued by Mr. E. Casselberry, for appellant, and Mr. Barton Bates, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

In a proceeding commenced in March, 1849, Smith, the husband, obtained a decree against his wife, divorcing her from the bonds of matrimony, without service of process upon his wife, and without her appearance in the cause. In this petition, she is alleged to be a non-resident, and publication was made against her as such. This, as a proceeding instituted before the present code of practice went into effect, was a proceeding in chancery. The act concerning divorces provides: "That the Circuit Court, sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony or maintenance, and the like process and proceedings shall be had in said causes as are had in other causes on the equity side of the court." (R. C. 1845, p. 426.) The act regulating practice in chancery, (art. 6, secs. 1, 2, 3 and 4, R. C. 1845, p. 851,) provides that, when a decree has been rendered in a chancery cause against a defendant who has not been summoned and has not appeared, such final decree may be set aside, if the defendant shall appear, and by bill of review, verified by affidavit, show cause for setting it aside as against equity. The time for filing such a bill of review is limited to one year after the service of notice of the decree upon the defendant, or to five years after the date of the decree, where notice is not given. The bill of review is required either to show that there is no equity in the original bill, or to contain such denials or allegations as amount to a defence upon the merits. When such bill is filed within the time, and containing the requisite denials or allegations, the decree is set aside, the defendant in the original cause answers the original bill, and the case proceeds as other cases.

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The wife, in the present case, filed her bill within the time limited by the statute, denying all the material allegations in her husband's original bill, and praying that the decree rendered against her be set aside and that she be permitted to answer. The Circuit Court set aside the decree, and gave the leave to answer. The answer was filed, showing, on her part, ground for divorce and praying for a divorce. The husband refused to proceed with the cause. The court heard the cause, dismissed the bill of the husband, and decreed a divorce in favor of the wife, with alimony. From this decree he has appealed.

1. As nothing appears before this court by any exception taken to any proceeding, we act only upon the questions arising upon the record proper. The statute which governs the case is clearly that which applies in all chancery cases under the code of 1845, and the review is to be applied for within the time and in the manner in that act provided. The section which requires the petition or bill of review to show that there is no equity in the original bill, or to contain such denials or allegations as amount to a defence upon the merits, substantially prescribes the statements of the bill upon which the decree is to be set aside, and the defendant in the original cause permitted to answer. We have no occasion to examine the nature and objects of, and the modes of proceeding upon a bill of review in the general chancery practice. The statute allows a decree to be obtained against a defendant who has never been summoned, and has never appeared in the suit, and then provides a mode in which such defendant may be admitted to defend himself against the suit, even after a decree is rendered. It appears in the record that the husband, after obtaining the decree of divorce, was married to another woman, and this is urged as a reason against setting aside the decree. It is not perceived how the wrong done to the second wife should be any reason for denying the first an opportunity of vindicating herself against the charges of adultery and drunkenness charged in the original bill. Nor do we feel at liberty to indulge feel-

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ings, or carry out any views of policy, against what we regard as the obvious meaning of the statute. We have nothing now to say about the effect of the proceeding in this case upon the second marriage or its issue, if there be any, because such matters have no connection with the questions before us.

We cannot consider the question, whether the wife made a proper affidavit to her answer to authorize a decree of divorce in her favor, because there was no exception to it taken in the court below.

There are no other questions in the case of any importance. The decree is affirmed, with the concurrence of Judge Ryland.

SCOTT, Judge, dissenting. In my opinion, the provisions of the law regulating chancery practice in relation to bills of review, (R. C. 1845, p. 851,) do not apply to proceedings instituted to obtain a divorce from the bonds of matrimony.

In the first place, if the courts in which such proceedings are begun will execute the law as it is written, a case for a review can scarcely arise. The 8th section of the act concerning divorce and alimony prescribes that, in all cases where the proceedings shall be *ex parte*, the court shall, before it grants such divorce, require proof of the good conduct of the petitioner, and be satisfied that he or she is an innocent and injured party.

In the same section, it is enacted: "nor shall the guilty party be allowed to marry again by reason of such divorce, unless otherwise expressed in the decree of the court." This provision impliedly gives the innocent party a right to marry immediately, and such has been the universal understanding of the community.

As the law-making power had the subjects of the parties marrying again and *ex parte* proceedings in its mind, at the same time, and prescribed a period within which the guilty party should not marry, had it been contemplated that the innocent party in *ex parte* proceedings, could not, with safety, marry again immediately, it would have been so declared.

Cunningham v. Gray.

Now, shall the law give to a man the privilege of marrying, and, after it has been exercised, withdraw it, and thereby make an innocent woman a concubine, and her children illegitimate? A purchaser for a valuable consideration, without notice, is protected by our law, and shall an innocent woman, in a matter that is dearer to her than life itself, be in a worse condition than a mere purchaser of property? How could the law ever justify itself to the children of such a marriage? It is bad enough when, through the frauds, falsehood and imposition of a parent, children are made to hang their heads in shame; but shall the law itself be made the instrument of so great an outrage?

Considerations of policy unite with the dictates of justice in forbidding any interference with the parties after a divorce has once been granted. The first marriage, in all such cases, without regard to the divorce, has ceased for all the purposes for which it was contracted. Its sorrows and disappointments have come and are without remedy. The breaking up of the second marriage may be revenge, but it is no reparation for the evils that have been already done. It is only a multiplication of the distresses and misfortunes of innocent women and children.

I consider the provision that the court should be satisfied that the petitioner should be an innocent and injured party, as taking this from the operation of ordinary chancery cases. The woman marries the man on the faith of the decree, which assures her that he is an innocent and injured party. The law in the English cases on this subject, in which divorces *a mensa et thoro* are considered, is not applicable. In England, no marriage can be dissolved by the courts, for any cause arising after the celebration of the nuptials.

CUNNINGHAM, Appellant, vs. GRAY, Respondent.

1. The act of March 5, 1849, exempting certain property of wives from the debts of their husbands, only applies where the debts are contracted *after the passage of the act* and before the wife comes into possession of the property.

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Appeal from St. Louis Court of Common Pleas.

This was an action brought by Cunningham to obtain the legal title and the possession of a lot of ground in the city of St. Louis, which he claimed under a sheriff's deed, by purchase at a sale under an execution against William T. Gray, upon a judgment rendered February 6, 1850. The record did not show at what time the debt accrued, upon which this judgment was founded. The lot was, by William G. Wright and wife, conveyed to Joseph B. Holland, by deed dated January 8th, 1851, in trust for the sole use of the wife of Gray. The plaintiff, claiming that the lot was purchased with the money of Gray, and that the title was made to his wife's trustee to defraud his creditors, brings this suit, making Gray and wife and her trustee, defendants.

At the trial, it was in evidence that the father of Mrs. Gray died in 1833, and by his last will devised to her a female slave, which was in the possession of Gray and wife as early as 1840. It was also in evidence that the mother of Mrs. Gray, about the year 1840, gave her, in money, the sum of \$300, and at a later period, \$100, and also that, before her death, which took place in January, 1849, she bought a slave for Mrs. Gray. There was evidence tending to show that the lot in controversy was purchased with money arising from the sale of these two slaves, after they had come into the possession of Gray. The court below gave several instructions, the third of which, upon which the case is made to turn, is set out in the opinion of Judge Ryland. There being a verdict and judgment for the defendants below, the plaintiff appealed to this court.

T. B. Hudson, for appellant.

Krum & Harding, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The questions in this case arise upon the instructions given by the court below. These instructions involve the construc-

tion of a statute of our state, passed by the legislature, and approved 5th March, 1849, which took effect from its passage. It is entitled "An act to amend an act entitled 'An act to regulate executions.'" The provisions of this act, so far as it is necessary to notice them in this case, are as follows :

§1. "In addition to the property now exempt from levy and sale under execution, by the tenth, eleventh and twelfth sections of the act of which this is amendatory, *the property owned by a woman before her marriage, and that which she may acquire after her marriage, by descent, gift, grant, devise or otherwise*, and the use and profits thereof *shall be exempt from all debts and liabilities of her husband contracted, or incurred by him previous to their marriage, or previous to the time the wife came into the possession of such property.*"

1. This statute cannot have any operation upon debts contracted before its passage. It must operate from its date prospectively. Debts contracted before its passage, and property liable to be sold for these debts before its passage, remain unaffected by it. The constitution of the state prohibits the legislature from passing any "law impairing the obligation of contracts or retrospective in its operation." (State Const., art. 13, sec. 17.) It may be then safely asserted that this act of the legislature does not operate, and was not designed to operate upon debts contracted before its passage.

From the record in this case, it cannot be ascertained when the debt on which the judgment of the Court of Common Pleas of St. Louis county was rendered in February, 1850, became due. This judgment is alleged to have been rendered on the 6th of February, 1850. Take this date, then, as the time the indebtedness of the defendant accrued, and it will be after the passage of the act, for the act was passed in March, 1849; and from the evidence preserved in the record, it will also be after the property had come into the possession of the wife. Now the act exempts the wife's property from debts and liabilities of her husband, contracted or incurred by him previous to their

marriage, or *previous to the time* the wife came into the possession of such property. If the date of the judgment then be taken as the day of the accruing of the indebtedness, all the evidence on the record shows that the property and money of Mrs. Gray were received by her before that date; and, consequently, the husband's indebtedness was not before, but after the reception by the wife of the money and property. If this be so, such money and property so received are not exempt from such a debt, under the terms of this statute. If we go behind the date of the judgment, and take a previous day as the time of the indebtedness, then we may go to a day before the act was passed, and, consequently, the debt becomes unaffected by it.

In either view, then, the third instruction, given by the court in this case, is erroneous. This instruction is as follows: "If the said property and money were so acquired by Mrs. Gray *after* said debt accrued, and were used by her for the purchase of the lot in question, then he did not furnish the money, and the plaintiff cannot recover." Now it may be that the money and property were acquired by Mrs. Gray *after* the debt accrued, and yet be acquired *before* the passage of the act under which she claims exemption.

The legislature intended that after 5th March, 1849, the property which a woman owned before her marriage, as well as that which she might acquire after her marriage, by descent, gift, grant, devise or otherwise, should be exempt from all debts of the husband, contracted or incurred previous to the marriage, or previous to the time the wife came into the possession of such property. The creditors of the husband, under such contracts, could not be presumed to have become such by means of any such property. It was not in his possession before his marriage; it was not in his possession when he contracted debts after his marriage, but before his wife acquired the property, as mentioned in the statute. Such property and money then, coming to the wife in the manner pointed out in this statute, could not be considered a fund in the husband's

hands, by which he might obtain credit. He was not considered as possessing the means, by such property, of extending and enlarging his power or means of becoming indebted. Creditors did not trust him with an eye to such property.

The judgment below must be reversed, and the cause remanded, to be further proceeded with, in accordance with the views set forth in this opinion.

I have not thought it necessary to notice each particular instruction, supposing that many of them will not be required in the further trial of this case. The other judges concurring, the judgment below is reversed, and the cause remanded.

DUHRING vs. DUHRING. (Cross Appeal.)

1. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt.

Appeal from St. Louis Circuit Court.

This was a petition by the widow of Andrew Duhring, for dower in a lot on Main street, in the city of St. Louis, in the possession of Henry Duhring.

Barrett Williams and Andrew Duhring were partners in business in St. Louis, from 1834 to 1839. The lot in question was, by Joseph Bouju and wife, on the 30th of July, 1836, conveyed to said Williams & Duhring, in consideration of \$22,500, \$5000 of which was paid in cash out of the funds of the firm, and for the balance, eight equal notes of the firm, secured by a mortgage, were given, payable annually. The grantees in the deed from Bouju were described as "Barrett Williams and Andrew Duhring, composing the firm of Williams & Duhring." The *habendum* clause in the deed was as follows: "To have and to hold, &c., unto them, the said Barrett Williams and Andrew Duhring, and to their heirs and assigns

forever." The firm had occupied a store on the southern half of the lot before the purchase, and continued to occupy the same store afterwards. A store upon the northern half they rented out. The purchase was entered upon the books of the firm as a partnership transaction. The lot was entered in the "property account," the money paid in the "cash account," and the notes given, under the head of "bills payable." On the 10th of May, 1839, before any of the notes secured by the mortgage had been paid, Barrett Williams, Andrew Duhring and his wife, the plaintiff, joined in a deed conveying the lot to the defendant. The firm of Williams & Duhring was indebted to the defendant about \$7000, and the lot was taken by him in payment, he assuming the payment of the notes secured by the mortgage, all of which were afterwards paid by him. The firm was actually insolvent at the time of this conveyance, and in November following, failed and made an assignment. All their debts have never yet been paid. At the time of the conveyance to Henry Duhring, the plaintiff was under twenty-one years of age, for which reason, she now seeks to avoid the conveyance and obtain her dower in the lot. The defendant set up in his answer, that the plaintiff was not entitled to any dower in the lot, because it was bought, held and used by the firm of Williams & Duhring, as partnership property; and that, even if she was entitled to dower at all, it was not until she had paid her proportion of the mortgage debt paid by him to Bouju. The cause was tried by the court without a jury. Barrett Williams testified that the purchase of the lot by the firm of Williams & Duhring was a partnership transaction, and that entries were made upon the books as above stated. On cross-examination, he stated that the lot was bought "as an investment, to keep until the firm closed business." The court, after finding the facts as above stated in regard to the deed from Bouju, the mortgage, the deed to the defendant, the occupation of the lot, and the entries upon the books of Williams & Duhring, found that the purchase by said firm "was regarded, at the time of making the same, as a mere investment, with a view and inten-

tion of ultimately keeping the same." Upon these facts, the court declared that the plaintiff was entitled to her dower in the undivided one half of the lot, subject, however, to the payment of one-sixth of the debt secured by the mortgage to Bouju, and ordered a reference to ascertain the amount of principal and interest due defendant on the mortgage, after deducting the nett rents and profits received, or which might, with reasonable diligence, have been received by him from the lot, not charging him with the increased rents arising from any permanent improvements erected by him, and making him reasonable allowances for money paid for taxes and repairs, &c. If the plaintiff should, within six months from the confirmation of the commissioner's report, pay one-sixth of the amount thus ascertained to be due the defendant, then her dower was to be set apart to her: if not, her dower was to be barred. From this judgment, both parties appealed. The cause was argued in this court by Mr. Casselberry, for the widow, and Mr. Shepley, for the defendant.

Mr. Casselberry made the following points: 1. The widow is entitled to dower, even where the partners purchase real estate with joint funds for partnership purposes. (2 Edwards' Ch. Rep. 28. *Thornton v. Dixon*, 3 Brown's Ch. Rep. 199. *Bell v. Phyn*, 7 Vesey 453. *Balmain v. Shore*, 9 Vesey, 500. *Coles v. Coles*, 15 Johns. Rep. 159. 7 Serg. & Rawle, 438. *Titus v. Neilson*, 5 Johns. Ch. Rep. 452. Park on Dower, 106, 9 Law Lib.) 2. There is nothing in this case to show that the property was purchased for partnership purposes. On the contrary, one half of the lot was rented out and never used by the firm; and the whole lot was bought "as an investment, to keep." 3. The lot was held by Williams & Duhring as tenants in common and not as joint tenants, by virtue of the act of 1835. 4. The court erred in requiring the widow to pay off a part of the mortgage before obtaining her dower. The mortgage of which defendant assumed the payment is to be regarded as a part of the price paid by him to Williams & Duhring for their interest in the lot. The judgment below in effect

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makes the widow pay a part of the defendant's debt, and gives him the land for less than he contracted to pay.

Mr. *Shepley* made the following points, among others: 1. That portion of the finding which states that the lot was purchased "as a mere investment, with the view and intention of ultimately keeping the same," is not warranted by the evidence. 2. The lot, from the time of its purchase from Bouju, was partnership property. (*Lancaster Bank v. Myley*, 13 Penn. State Rep. 544. *Hoxie v. Carr*, 1 Sumner, 173. *Dyer v. Clark*, 5 Metcalf, 579, 581. *Boyers v. Elliott*, 7 Humph. 204. *Pugh v. Currie*, 5 Ala. 446. *Pierce v. Trigg*, 10 Leigh, 406. *Edgar v. Donnely*, 2 Mun. 387. *Smith v. Ramsay*, 1 Gil. 373. Walker's Ch. Rep. 200. *Sigourney v. Munn*, 7 Conn. 11. 3 Howard (Miss.) 372. 5 Ala. Rep. 446. 1 Dev. & Batt. 510. Parsons on Contracts, p. 125. 3 Kent's Comm. (6th ed.) 37, and note at p. 39.) 3. Partnership real estate is to be treated as personal property, unless upon a dissolution of the firm and payment of all its debts, it is no longer needed for the purposes of the partnership. (5 Vesey, 189. 7 Vesey, 425. 1 Russ. & Mylne, 45. 1 Mylne & Keen, 649. 3 id. 443. 11 Simons, 491, quoted in 11 Barb. S. C. Rep. 72. *Buchan v. Sumner*, 2 Barb. Ch. Rep. 165. 5 Metcalf, 562. 4 id. 54. 10 Leigh, 406. 1 Dev. & Batt. Ch. 510. *Pugh v. Currie*, 5 Ala. 446.) 4. The wife is not dowerable in partnership real estate needed for partnership purposes. (Parsons on Contracts, 128. 5 Gill, 26. *Greene v. Greene*, 1 Ham. 244. *Richardson v. Wyatt*, 2 Dess. 471. *Woodbridge v. Wilkins*, 3 Howard, (Miss.) 371. 4 Metcalf, 541. 5 id. 562, 582. 10 Leigh, 406.) The only case to the contrary is *Smith v. Jackson*, (2 Ed. Ch. Rep. 28,) and the only authority cited to sustain it is 5 Vesey, 189, which has long since been overruled in England.

RYLAND, Judge, delivered the opinion of the court.

1. It will not be necessary, in our opinion, to consider all the points and questions raised by the parties on this record. Both

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parties complain of the judgment of the court below, and both bring the case here. The plaintiff alleges that the court erred in regard to the mortgage, and insists that she is entitled to dower in one undivided half of said premises, independent of the mortgage, and that she should not be required to redeem the same. She alleges that the right to set up said mortgage is barred by the statute of limitations, and that the defendant has no right to be substituted in the place of Bouju.

The defendant insists that plaintiff has not, and never had any right to dower in the lot, because it was purchased by the firm of Williams & Duhring as partnership property; was used as such; paid for, in part, by the cash of the firm, and the notes of the firm given for the balance of the consideration. There can be little doubt that the purchase was made by the firm of Williams & Duhring. They were partners, doing business as merchants in St. Louis, in 1834, and were so engaged in 1836, when they bought the lot of Bouju. The deed from Bouju to them shows the purchase by the firm. The witness, Williams, says it was a purchase by the partnership; says, "the purchase took the shape of a partnership transaction on the books of said firm. There was a property account, and this lot was entered into that account. The cash paid was entered into the cash account, and the notes given for the purchase, were entered into the books under the head of "bills payable." There were two stores on the lot; one was rented out by the firm, the other was occupied by it. He says "the lot was bought as an investment, to keep until we closed business."

The partners, Williams & Duhring, executed a mortgage, which was also signed and executed by the plaintiff, the wife of Duhring, to Bouju, to secure the payment of the balance of the purchase money, being seventeen thousand five hundred dollars. The plaintiff was a minor when this mortgage was executed by her.

The firm of Williams & Duhring being largely indebted to Henry Duhring, the defendant, sold him the lot in 1839, and

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made a deed to him, which was also signed by the plaintiff and acknowledged by her. The consideration was the sum of \$24,500 — \$7000 of which was then due and owing to Henry Duhring, by the firm; and he agreed to pay off the debt due under the mortgage to Bouju. The firm never paid any more of the original purchase money to Bouju than the first payment of \$5000. The balance was paid by Henry Duhring. The plaintiff was a minor when she executed, with the partners, Williams & Duhring, the deed in 1839, to Henry Duhring.

The firm of Williams & Duhring became insolvent, wholly unable to pay the debts of the firm. Some of these debts still remain due and unpaid. The firm was insolvent when the deed was made to Henry Duhring in 1839.

Now is the widow entitled to dower in real estate bought by the firm, paid for with the funds of the firm, and bought for the use of the firm? If she is not, it will be useless to consider any other question in this case. I lay out of consideration the fact that there were two store houses on the lot, one of which was rented out by the firm; and the remark of the witness, that the lot was bought as an investment, to keep until the close of the concern. These, taken together, cannot warrant the court in saying it was not partnership property—was not bought for the use of the firm. It was purchased for the stand or store of the firm; and renting out a part of the real estate, not necessary for the immediate occupation of the firm, did not and cannot change the nature or design of the purchase. I will remark further, before I proceed to consider this question, that the court below was not warranted in finding "that the purchase was regarded by the parties, at the time of making the same, as a mere investment, with the view and intention of ultimately keeping the same." There is nothing preserved in the record to warrant this finding. It would be a strange conclusion that, if a mercantile firm should buy a lot for the purpose of carrying on their business as merchants in a city, some thirty or fifty feet front, running a hundred and fifty feet back, and there should happen to be a store house on the front

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of the lot and an ice house in the rear, and the merchants should rent out the ice house, that their renting out the ice house should render half the lot purchased no longer partnership property.

The main question, however, must now be considered. Is the widow dowable in real estate belonging to the firm, which was purchased by the partners for partnership purposes, with partnership funds? There is no question here between heirs, personal representatives and widow. The debts of the firm would have swallowed up the partnership property here, and still demanded more.

I answer that the widow, in this case, is not entitled to dower. The real estate purchased by the partners must be considered, so far as is necessary to pay the debts of the firm, partnership stock, and liable to the rules and regulations incident to personal property.

It was held in *Thornton v. Dixon*, 3 Brown's Ch. Rep. 199, that real estate, used for purposes of a partnership trade, shall go to the heir, and not to the executor. This case and some others, more modern, (this case was decided in 1791,) (see *Bell v. Phyn*, 7 Vesey, 453. *Balmain v. Shore*, 9 Vesey, 500,) militate against the rule above laid down, that such estate becomes partnership stock. But the authority of these decisions has been much questioned.

The general principle now declared in the English law is, that real estate, acquired for the purpose of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership. In *Fereday v. Wightwick*, 1 Russell & Mylne, 45, the Master of the Rolls, Sir John Leach, said: "The general principle is, that all property acquired for the purpose of a trading concern, whether it be of a real or personal nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership. It is true, a mining concern differs, in some particulars, from a common partnership; the shares are assignable, and the death or bank-


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ruptcy of the holder of shares does not operate as a dissolution; but it has been repeatedly held to be in the nature of a trading concern." In *Phillips v. Phillips*, 1 Mylne & Keen, 649, it was held that real estate, purchased with partnership capital, for the purposes of the joint trade, is personal estate, and in respect of the share of a deceased partner, retains that character, as between his real and personal representatives. The Master of the Rolls said in this case, "that, with respect to the question, whether freehold and copyhold property, purchased with the partnership capital, and conveyed to the two partners and their heirs, for the purposes of the partnership trade, is to be considered as personal estate only, for the payment of the partnership debts, or is generally to be considered to the extent of a moiety, as personal estate of a deceased partner. I confess I have, for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate. In the case of *Fereday v. Wightwick*, 1 Russ. & Myl. 45, I had no intention to confine the principle to the payment of the partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion, and general convenience requires that this principle should be adhered to." This case was decided in 1832. It was held in *Broom v. Broom*, 3 Mylne & Keen, 443, decided in 1834, that real estate, purchased with partnership capital, and applied to the purposes of the trade, was, in a court of equity, to be considered as personalty, and that, therefore, the infant heir of a deceased partner, upon whom the estate had descended, was a trustee for the widow and administratrix of the deceased partner. Professor Parsons, in his treatise on contracts, (chap. 12, sec. 2,) says: "All kinds of property may be held in partnership; but real estate is still subject, to a certain extent, to the rules which govern that kind of property. There is some conflict and perhaps uncertainty as to the rights and remedies

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of partners and creditors in respect to real property which belongs to the partnership, both in England and in this country. But we consider the prevailing and just rule to be, that when real estate is purchased with partnership funds, for partnership purposes, it will be treated as partnership property, and held like personal property, chargeable with the debts of the firm, and with any balance which may be due from one partner to another, upon the winding up of the affairs of the firm. But it seems to be the prevailing rule in this country that, as between the personal representative and the heirs of a deceased partner, his share of the surplus of the real estate of the partnership, after all its debts are paid, and the equitable claims of its members are adjusted, will be considered and treated as real estate." He continues: "It has been held that the real estate of a partnership does not acquire the incidents or liabilities of personal estate, unless there be an agreement of the partners to that effect, and that then this change in the legal nature of the property results from this agreement; but we doubt the accuracy of this ruling." For this last doctrine, making an agreement necessary to change the nature of the partnership real property to personal, the author cites *Coles v. Coles*, 15 John. Rep. 159; the case from Brown's Ch. Rep. of *Thompson v. Dixon*; *Bell v. Phyn*; *Balmain v. Shore*, above cited by me in this opinion, and the case of *Smith v. Jackson*, 2 Edwards Ch. Rep. 28. This last case is the principal authority on which the plaintiff relies. But, with Professor Parsons, I greatly doubt the accuracy of the ruling in that case. Parsons says, "the widow has her dower in the estate after the debts are paid, but not until then." See p. 128, Treatise on Contracts.

In *Hoxie v. Carr*, 1 Sumner, 183, Justice Story said: "A question often arises whether real estate, purchased for a partnership, is to be deemed, for all purposes, personal estate, like other effects. That it is so as to the payment of the partnership debts, and the adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in view of a



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court of equity." Again, in the same case, he said: "The question here is not whether real estate, when it is partnership property, becomes, to all intents and purposes, in cases of intestacy and wills, personalty; but whether it is to be so treated in equity, as between the partners themselves and the creditors of the partnership. It seems to be the established doctrine of courts of equity, that it is to be treated as personalty, as between the partners and their creditors, in whose name soever it may stand on the face of the conveyance." The Court of Appeals of Maryland, in the case of *Goodburn and wife v. Stevens et al.*, 5 Gill's Rep. 28, says: "The doctrine that real estate, purchased with partnership funds, for its use and on its account, is to be regarded in a court of equity as the personal estate of the partnership, for all the purposes thereof, stands upon a familiar and just principle. It is the clear case of an implied or constructive trust, resulting from the relation which partners bear to each other, and from the fact that the estate was brought into the firm, or purchased with the funds of the partnership, for the convenience and accommodation of the trade. For this reason, in whose name soever the legal title may reside, the estate is held, in the eye of a court of equity, for the use of the partners as the *cestui que trust*, and if a partner dies, the legal estate, of which he was seized as a tenant in common, passes to his heirs or devisees, clothed with a similar trust in favor of surviving partners, until the purposes for which it was acquired have been accomplished."

Chancellor Kent, (3 Com. 37,) says: "If partnership capital be invested in land for the benefit of the company, though it may be a joint tenancy at law, yet equity will hold it to be a tenancy in common, and as forming a part of the partnership fund; and the better opinion would seem to be, that equity will consider the person in whom the legal estate is vested, as trustee for the whole concern, and the property will be entitled to be distributed as personal estate. In the case of *Sigourney v. Munn*, (7 Conn. Rep. 11,) the English and American authorities were fully examined, and the subject discussed, and

the doctrine declared, that real estate purchased with partnership funds, for partnership purposes, would be regarded in equity as partnership stock, and liable to all the incidents of partnership property. It was also declared that it might, by agreement of the parties, be regarded as personal stock. Chancellor Kent, in a note on page 38 of the third volume of his Commentaries on this subject, quotes the remark of Chief Justice Shaw, in *Burnside v. Merrick*, 4 Metcalf, 541, that the prevailing judicial opinion now is, that real estate, purchased by partners, with partnership funds, for partnership purposes, though at law it may be held by them as tenants in common, yet, in equity, it is considered as held in trust as part of the partnership property, applicable, in the first place, exclusively to pay the partnership debts." After citing *Dyer v. Clark*, and *Howard v. Priester*, (5 Met. 562, 582,) and *Divine v. Mitchum*, (4 Ben. Monroe, 488,) he says: "The prevalence and correctness of this doctrine appear to be incontestable." The Vice Chancellor in New York, in *Smith v. Jackson*, (2 Edwards' Rep. 28,) already cited in this opinion, after reviewing all the conflicting cases on the point, follows the Supreme Court of New York; and holds that, though real estate be purchased with joint funds, for partnership purposes, there is no survivorship as to the real estate, and the share of a deceased partner, as a tenant in common, descends to his heirs, unless there be an agreement among the partners that the lands so purchased shall be considered as personal property; and that then, upon the foot of that agreement, and not without it, equity would apply the lands to pay partnership debts. Nay, he gives the wife her dower in the partnership share of the husband so descended. "The decisions maintaining this doctrine appear to me," says the author, "to be a sacrifice of a principle of policy, and, above all, of a principle of justice, to a technical rule of doubtful authority. There is no need of any other agreement, than what the law will necessarily imply from the fact of an investment of partnership funds by the firm in real estate for partnership purposes. If the partners

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mean to deal honestly, they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts."

In *Richardson v. Wyatt*, (2 Dessaus. 471,) the widow of a deceased partner, in South Carolina, was denied her dower in lands purchased with partnership funds and held in the names of all the partners. In *Pierce v. Trigg*, (10 Leigh, 406,) Judge Tucker, in pronouncing the opinion of the court, laid down the doctrine, that lands purchased by partners, with partnership funds, for partnership purposes, and used as a part of the stock in trade, are to be regarded in equity as partnership property, and though, if the conveyance has been made to both partners, there will, upon the death of one, pass to his heirs a legal title, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would of the personal estate of the firm. I know that there have been some decisions to the contrary, which gave the wife dower to land, but from a very general and careful review of the various decisions, from that of *Thornton v. Dixon*, down to the present time, I come to the conclusion, that the policy of the law and principles of justice are against the right of the wife to dower in such lands, where they are necessary to pay the demands of the firm, and the weight of authority, both English and American, is decidedly against such right.

I could have contented myself with reference to the views of this court, lately expressed in the case of *Carlisle's Adm'r v. Mulhern & Keyser*, (19 Mo. Rep. 56.) The principles of that decision mainly settle this case.

The court below having declared the plaintiff, as widow of Andrew Duhring, entitled to dower in one half of the lot, upon certain terms, its decision upon the facts found is erroneous, and its judgment is reversed, with the concurrence of the other judges.

WILLIAMS, Plaintiff in Error, *vs.* DONGAN, Defendant in Error.

1. D. bought a claim to a tract of land in 1820, and soon afterwards took possession of it, built a dwelling, lived upon and cultivated it for eight or ten years, and then removed to Illinois. Afterwards, he paid all the taxes upon the land, had tenants on it part of the time, and when not tenanted, had an agent in the neighborhood to rent it out for him and protect it from trespassers. *Held*, this was such an adverse possession as, after the lapse of twenty years, was protected by the statute of limitations.
2. There is no tacking of disabilities under our statute of limitations.

Error to St. Louis Court of Common Pleas.

Action commenced in June, 1851, for the possession of 160 arpens of land on the river Des Peres in St. Louis county, being part of a tract of 1600 arpens granted by Zenon Trudeau in 1797, to Therèse Barrois and Francoise Brazeau, and confirmed by the act of congress of April 29, 1816. On the 2d of April, 1811, the said Therèse and Francoise made a division of the tract, and executed to each other deeds for their respective halves. The western 800 arpens, including the land in controversy, were conveyed to Francoise. On the 4th of April, 1811, Francoise conveyed 266 $\frac{2}{3}$ arpens, including the land in dispute, to her daughter, Genevieve Duchouquette. Genevieve was lawfully married to Pierre Duchouquette in 1797, and they lived together as man and wife until December 24, 1803, at which time they separated, and never afterwards lived together. At the time of the separation, they executed written articles, dissolving the marriage (so far as their agreement could dissolve it,) dividing the property owned by them in community, renouncing mutually all rights and powers flowing from their marriage contract, (so far as they could by agreement do so,) and granting to each other the free and absolute disposition and control of their property and conduct, as if they never had been married. Genevieve died November 13, 1822, leaving one daughter, Marie Sophie, who was born Feb-

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ruary 26, 1807, and married to James Gonsollis, January 2, 1823. Pierre Duchouquette died in 1835 or 1836. On the 16th of March, 1812, Genevieve Duchouquette sold the 266 $\frac{2}{3}$ arpens acquired from her mother to John Murphy, and on the same day, Murphy mortgaged the same to Genevieve to secure the payment of a sum of money. On the 27th of December, 1819, Genevieve assigned the mortgage to Archibald Gamble, and on the 17th of January, 1820, conveyed to him all her interest in the land. On the 17th of July, 1820, Gamble assigned the mortgage to the defendant, Dongan, and conveyed to him all his interest in the land. The defendant instituted a suit to foreclose the mortgage, and became the purchaser of the land at the sale under the judgment of foreclosure, and received from the sheriff a deed bearing date February 6, 1822. Defendant took possession of the land soon after his purchase from Gamble, in 1821 or 1822, built a dwelling, made fields, and lived upon the land for eight or ten years, and then removed to the state of Illinois. Since that time, he has never personally been upon the land, but part of the time has had tenants upon it, and when not tenanted, has all the time had an agent residing in the neighborhood, charged with the duty of renting it out, if tenants could be had to pay the taxes, and to superintend and control, and protect it from trespassers. The defendant always paid the taxes, and no person under whom plaintiff claims ever paid any taxes.

The plaintiff's title was as follows : On the 23d of October, 1841, James Gonsollis and Marie Sophie, his wife, claiming the tract of 266 $\frac{2}{3}$ arpens in right of the wife's mother, conveyed the same to John E. Mower. Mower afterwards conveyed all the tract except the 160 arpens in controversy to James Consaul. Mower failing to pay the purchase money, the tract in dispute was sold under a decree of court upon a bill filed by Gonsollis and wife, and P. C. Morehead, under whom plaintiff claims, became the purchaser, and received a sheriff's deed dated March 11, 1850.

Upon an agreed case, substantially as above stated, the court

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below gave judgment for the defendant. The plaintiff brings the case to this court by writ of error.

Glover & Richardson, for plaintiff in error, relied upon the following points: 1. By the Spanish law, whatever property fell to the wife during marriage by any merely lucrative title was paraphernal, (*Lindell v. McNair*, 4 Mo. Rep. 382,) and could not be sold by the wife during coverture, unless the husband joined in the sale. (*Picotte v. Cooley*, 10 Mo. Rep. 312. *Youse v. Norcum*, 12 Mo. Rep. 558. *Childress v. Cutter*, 16 Mo. Rep. 41.) 2. The articles of separation did not confer on the wife the power to alien without further consent of the husband. Those articles were void, as being both against good morals and against the Spanish law. (1 Moreau & Carleton's *Partidas*, p. 487, 493, 502. 2 *Id.* *Gonsollis and wife v. Duchouquette*, 1 Mo. Rep. 476.)

Mr. *Dayton* and Mr. *B. Bates*, for defendant in error, relied upon the following points, among others: 1. The articles of separation between *Duchouquette* and wife of December 24, 1803, were valid and effectual, and accomplished all the objects therein mentioned and intended. Mrs. *Duchouquette* having acquired and sold the land in controversy subsequent to this contract, the title passed to the purchaser. (*Labbe's heirs v. Abot et al.*, 2 Lou'a. 553.) 2. The land in controversy, acquired by *Genevieve* by deed of gift from her mother, was her separate property, (1 Lou'a. 322. 5 Lou'a. 742. 6 *Martin*, 14,) which, by the Spanish law, she had a right to sell, even during coverture, without her husband joining in or consenting to the conveyance. (1 *Brown's Civil Law*, 269, 82, 255. 1 *Domat*, 390, §884 to 892. 1 Moreau & Carleton's *Partidas*, 523, §17. *Flowers v. O'Connor*, 8 *Martin*, (N. S.) 555. *Preston v. Humphreys*, 5 *Robinson*, 299. *Picotte v. Cooley*, 10 Mo. Rep. 318.) 3. But even if the husband's consent to the sale was necessary, such consent is sufficiently shown by the articles of separation. If, however, a written consent is not shown by the articles of separation, a verbal consent, which, under the Spanish law, was sufficient, will be

presumed after this lapse of time and under the circumstances. 4. The statute of limitations is a good bar to the plaintiff's claim. The possession of Dongan is a sufficient adverse possession. (Angell on Limitations, (ed. of 1829,) ch. 4, p. 71 *et seq.* and cases there cited.)

RYLAND, Judge, delivered the opinion of the court.

As the point raised on the statute of limitations in this case must, in the opinion of this court, determine the question in controversy, it will only be necessary to consider it. We shall not, therefore, touch the other questions involved, but pass them by, with the remark, that they involve much learning, and require more time and research than we can now bestow, especially when the point we decide will settle the case. From the agreed facts, as they are upon the record, it seems that the widow Charleville was the owner of the land in controversy in 1811, and that she granted the same to Genevieve Duchouquette, her daughter, by deed dated 4th April, 1811; that Genevieve Duchouquette, being in the legal possession of the land, received a mortgage from one John Murphy, on the 16th of March, 1812, for the same land, to secure the payment of a sum of money; that she assigned said mortgage to Archibald Gamble and sold to him all her interest in said land, in January, 1820. The mortgage was assigned 27th December, 1819, and the deed for the land dated 17th January, 1820.

Archibald Gamble sold and conveyed the land by deed dated July 17th, 1820, to the defendant, Dongan. Dongan took possession of the land soon after his purchase of it from Gamble, in 1821 or 1822. He foreclosed the mortgage by a judgment of the Circuit Court of St. Louis county, at the August term, 1821, and purchased the land at sheriff's sale, on the 6th day of February, 1822, and received from the sheriff a deed for the same, of that date. It is agreed that Dongan took possession of the land soon after his purchase from Gamble in 1821 or 1822, and that he built a dwelling house, made fields,

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and lived upon the land for eight or ten years, and then removed to the state of Illinois. Since that time, he has never personally been upon the land, but part of the time has had tenants on the land ; and when not tenanted, has all the time had an agent residing in the neighborhood, charged with the duty to rent it out if tenants could be had, to pay the taxes and to superintend and control and protect it from trespasses, and that he habitually paid the taxes ; that no person under whom the plaintiff claims did pay taxes.

It also appears that Pierre Duchouquette and Genevieve Charleville were lawfully married on 23d February, 1797 ; they lived together as man and wife until the 24th of December, 1803, and then separated, and never lived together afterwards, as man and wife ; that they mutually executed a contract or articles of separation in writing, dissolving the marriage (so far as their agreement could dissolve it,) dividing the property owned by them in community, renouncing mutually all rights and powers flowing from their matrimonial or marriage contract, and granting to each other the free and absolute disposition and control of their property and conduct, as if they never had been married ; that they never went beyond the limits of St. Louis county after their marriage ; that Genevieve died on the 13th November, 1822 ; that Pierre died in 1835 or '36, intestate ; that Genevieve had two children, a son and a daughter ; that the son died without issue in the life time of his mother ; that the daughter is the same Sophie or Marie Sophie mentioned in the plaintiff's petition, under whom he derives titles. The said Sophie or Marie Sophie was born on the 26th February, 1807, and on the 2d day of January, 1823, intermarried with one James Gonsollis, who died one or two years before this suit was commenced. At the death of her mother, Genevieve, 13th November, 1822, Marie was a minor, unmarried, and remained single until the 2d January, 1823. Dongan was in possession and remained in possession for some eight or ten years from the year 1821 or some time in 1822. He took possession *soon* after he bought of Gamble ; his pur-

chase from Gamble was in July, 1820; his purchase at sheriff's sale was in February, 1822. It may then be supposed he was at the time in possession: his possession was open, public; he built a house, made fields, lived on the land, paid taxes always, had tenants after he moved to Illinois, and had his agent to take care of and attend to it, in the neighborhood.

The right of the daughter, Marie Sophie, if she had any, accrued upon the death of her mother, which took place on the 13th of November, 1822. She was then sole, and infancy was at that time the only disability under which she labored, or by which her right at that time was protected under the statute of limitations. The statute passed in December, 1818, concerning limitation of actions, must govern this case. That declares, "From henceforth, no person or persons whatsoever shall make entry into any lands, tenements or hereditaments, after the expiration of twenty years next after his, her or their right or title to the same first descended or accrued," &c.

§2. "If any person or persons having such right or title be, or shall, at the time such right or title first descended or accrued, be within the age of twenty-one years, *feme covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty years be expired, bring his, her or their action, or make his, her or their entry, as he, she or they might have done before the passing of this act: Provided, that such person or persons shall, within twenty years next after attaining full age, &c., sue for the same, and at no time after the said twenty years."

The court, from the agreed facts, found for the defendant, and this finding we think right. From the facts and the statute of limitations then in force, we think the court did not err in giving judgment for the defendant.

There was a space of time between the concurrence of the two disabilities of infancy and coverture. The right descended to her, accrued to her, while she was under one only of these disabilities—infancy. She became of age on 26th of February, in the year 1828. At that time, then, the statute com-

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menced running against her, although she was a married woman. The disability arising from the marriage commenced after her rights had accrued. The twenty years expired then on the 26th February, 1848, and this action was commenced in June, 1851, not within the time, and is consequently barred.

I remarked, in the beginning, that, as this one point would settle this controversy, it would be useless labor to consider the questions arising on the articles of separation, or the power of the wife to sell lands which had been given to her after this separation, or given to her during her marriage, disregarding the separation.

I am strongly inclined to think that, should the court declare the articles of separation of no effect, in regard to the power of dissolving the marriage relation between the husband, Pierre, and Genevieve, the wife, yet it would be but a fair interpretation of them, to consider them as indicating the consent of the husband to the wife to sell her property. However, as the statute of limitations is, beyond all doubt, a bar to the plaintiff's action, we confine our opinion alone to that one point. There is no tacking of disabilities under our statute of limitations. See cases of *Eager v. Commonwealth*, 4 Mass. Rep. 182. *Bunce et al., v. Wolcott et al.*, 2 Conn. 27. *Griswold v. Butler*, 3 Conn. 227. *Doe ex dem. v. Jones*, 4 Term Rep. 301, 307. *Stowell v. Lord Zouch*, Plowden's Rep. 353, as far back as 10th year of Elizabeth.

The judgment below is affirmed, the other judges concurring.

THE CITY OF CARONDELET, Appellant, vs. McPHERSON, Respondent.

1. The title of Carondelet to common, under the act of June 13, 1812, may be established without a survey, by proof of user prior to December 20, 1803.
2. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists.

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3. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by the city of Carondelet in 1852, for the possession of a tract of land bounded south by the northern boundary of the city of Carondelet, as incorporated in 1851, north by the St. Louis common, as surveyed, east by the Mississippi river, and west by the Carondelet common fields. The plaintiff claimed the land as a part of the common confirmed to the inhabitants of Carondelet by the act of congress of June 13, 1812, although it was not within any survey of the common. The defendant claimed under a patent from the state of Missouri, dated February 27, 1850, issued in pursuance of an act of assembly. (Sess. Acts, 1849, p. 64.) The land was located in the manner pointed out by said act, as a part of the 500,000 acres granted to the state by an act of congress approved September 4, 1841. The substance of the oral and documentary evidence offered by the respective parties at the trial is stated in the opinion of the court. Under an instruction, which is also set out in the opinion, there was a judgment for the defendant below, from which the plaintiff appealed. The cause was argued in this court by Mr. Casselberry, for appellant, and Mr. Todd and Mr. McPherson, for respondent.

Mr. Casselberry made the following points, among others :

1. As to the definition of common in the Spanish law he cited 1 Moreau & Carleton's Partidas, p. 328. *Chouteau v. Eckhart*, 2 Howard, 373. 2 White's Recop. p. 47, 100, 118.
2. The act of June 13, 1812, did not require that the common should be inhabited, possessed, cultivated or *used* as common. If it was *claimed* as such by the people interested, and recognized as such by the existing government, to be used at any future period, when necessity or convenience required, this is all the law of 1812 required.
3. The instruction given by the

court, assuming that a survey by the United States is necessary in order to vest a complete title in the plaintiff, is directly in opposition to the decision of the Supreme Court of the United States in the case of *Chouteau v. Eckhart*, 2 Howard, 344. The only object of a survey of a confirmed claim is to locate the land where the boundaries are uncertain; but when the boundaries can be ascertained, a survey is unnecessary. (*Smith v. United States*, 10 Peters, 331. *United States v. Are-dondo*, 13 Peters, 134.) In this case, the boundaries of the land are very definite. It is bounded on the west by the common field, on the south by the town, on the east by the river, and on the north by a line running west from the Sugar Loaf. This line is clear and definite, as shown on the plats and by the evidence. This court has often decided that no survey is necessary in the case of a town or village lot or common field lot. Mere verbal proof of a confirmation is sufficient. The common was granted by the same law and the same section, and why require a survey? 4. The survey of Brown, as shown on the plat itself, does not include all that is "claimed," as required by the act of 1824. All of the common north of the town should have been surveyed separately from that south of the town. 5. There is no estoppel against the plaintiff. To pass an estate by estoppel, the party must have power to pass it by a direct conveyance. (*Dugal v. Fryer*, 3 Mo. Rep. 31.) Until the city of Carondelet was chartered in 1851, the corporate authorities had no power to make any other disposition of the common than to lease it; and as they had no power to convey in fee simple, they could do no act that would operate as an estoppel, any further than in relation to leases; and as the defendant denies that he is tenant, he cannot set up an estoppel of any kind. The estoppel of a deed only extends to parties and privies thereto, and not to strangers. The defendant would be a stranger to any estoppel of the kind insisted on. (*Cottle v. Snyder*, 10 Mo. Rep. 763.)

Mr. *Todd*, for respondent, relied upon the following points :
I. Upon the law and evidence, the instruction given by the

court below in this case was correct. 1. The appellant has no title to commons, except by virtue of the act of congress of June 13, 1812. 2. Under that act, she has no title to commons, unless supported by a *rightful* claim, *or* by a valid United States' survey designating them and severing them from the public domain. 3. She can have no *rightful* claim to commons except by a concession, or grant or permission from the Spanish government, and of this her highest and sole admissible evidence is the reply of governor Trudeau to the petition of Gamache, and Soulard's official survey, by which her common is located south of her. To this she is limited by her own constituents and original founders, in their acts of notice of their claim to the recorder of land titles, and the subsequent presentment of their claim before the old board of commissioners. Against this evidence, parol testimony is inadmissible. 4. No United States survey of the common embraces the land sued for. II. The survey of Rector, and of Brown as a retracing thereof, is conclusive upon the plaintiff as to the location of her commons. (See acts of congress providing and regulating surveys, from 1785 to 1836.) III. At least, the survey is conclusive as against the United States and Carondelet, in favor of third persons deriving title from the United States outside of such survey, after the approval thereof by the surveyor general, and before its legal cancellation, if subject to cancellation at all, and in fact cancelled. (3 Howard (U. S.) 773, 787, and cases cited therein. 8 id. 313-14. 5 La. Ann. Rep. 510, and cases there cited. 3 Peters, 96.) IV. The commons confirmed to Carondelet by the act of June 13, 1812, are to be presumed to embrace her claim therefor in location and extent filed by her before the old board of commissioners, and no other, in the absence of further legal action in her behalf by the United States. V. In the absence of the evidence of the plaintiff's claim for commons, as filed before the old board, and of duly authorized surveys, the plaintiff has no title or property to commons of any standing in a court of justice, under the laws of this state. The principle of this

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proposition is founded upon the vagueness and uncertainty of both the location and of the quantity of the commons. VI. The record shows an estoppel upon Carondelet from claiming any land between the south line of the St. Louis common and the north line of Brown's survey of her own. As to the objection of a want of privity, it may be answered that defendant occupies the position of the United States, between whom and plaintiff there was a direct privity. As to the objection that the inhabitants of Carondelet had no incorporation competent to be estopped until 1851, it may be answered, 1. That they had from 1825. (Acts of 1825, p. 211, 212, sec. 1.) 2. If not, still the inhabitants could be estopped in their collective capacity. They are to be regarded as a *quasi* corporation, a political or municipal body, a town or village; not as so many separate and independent individuals, holding their commons as tenants in common or joint tenants. (*Bird v. Montgomery*, 6 Mo. Rep. 523.)

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff claims the land in controversy as a part of the commons of the village of Carondelet, confirmed by act of congress of June 13th, 1812. At the trial, no grant of commons was produced by the plaintiff, and no survey, Spanish or American. The reliance was upon the proof by witnesses, that, at a period before the change of government, the authorities of the village of St. Louis and Carondelet met together to mark the line between their respective commons, and that this meeting was by the direction, or with the knowledge and approbation of the lieutenant governor, and was attended by the surveyor general; that, at the meeting, it was agreed to run the line from a noted mound called the "Sugar Loaf," on the bluff of the Mississippi river, to the line of the common fields of Carondelet, or, as some of the witnesses say, to the north-east corner of those fields; that the line was accordingly run by the surveyor general and cut out and marked by monuments; that

a fence was made upon that line, and the inhabitants of the two villages used the land on the different sides as their respective commons. The claim of the plaintiff was entirely rested upon this parol evidence.

On the part of the defence, documentary evidence was given of the claim of Carondelet to commons, as exhibited before the first board of commissioners. The notice of the claim was in these words: "Take notice, that we, the inhabitants and settlers of the village of Vide Poche, in the district of St. Louis, claim, title to 6,000 arpens of land, situate adjoining said village, by virtue of a concession from Don Zenon Trudeau, lieutenant governor of Upper Louisiana, dated the 7th December, 1796." This notice was addressed to the recorder of land titles, and was accompanied with the documents which are set out in the case of *Dent v. Bingham*, 8 Mo. Rep. 585. It may be necessary to say that there are no boundaries given either in the supposed grant, or in any survey filed with the claim, which apply to land north of the village. The document which is called a grant, is simply a refusal of the lieutenant governor to grant to an individual certain land he applied for, upon the ground that the land demanded was within the limits of land reserved for the purpose of furnishing wood necessary for the use of the village of Carondelet, and declaring that no other concession could be granted in the direction of a line taken from the end of the lands of the village, and running parallel with the Mississippi one hundred and fifty arpens further down said river. The defendant gave in evidence two surveys under the authority of the United States, one made in 1817, and the other in 1834, both professing to be surveys of the common of Carondelet, neither of which included the land now in controversy. The second was but a retracing of the lines of the first survey. The plaintiff, when giving rebutting evidence, produced a decision of the Secretary of the Interior, made in January, 1853, which was probably designed to set aside the surveys of the common, although it does not explicitly declare such purpose. The defendant gave evidence to show

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that the corporate authorities of Carondelet had always recognized the survey made in 1834 as the correct survey of the common ; had divided the property contained within it into lots, and disposed of the same ; had, in different actions at law involving the title to the common, relied upon and used that survey as a correct survey of the claim, and, in other modes, had acted upon it as a satisfactory survey.

The Court of Common Pleas, at the trial of the case, gave a single instruction, which, under the evidence, was a denial of the plaintiff's right to recover. It is in these words : " If the premises sued for are north of the town or village of Carondelet, as the said town or village existed up to the 13th June, 1812, and said premises are not included within any United States survey of the common of Carondelet, or of the out-boundary of said town or village, officially run so as to include the town or village and out-lots, common field lots, and common of said town or village, then the jury should find for the defendant." There was no disputing the fact that the property was north of the village, and there certainly was no survey in evidence, which was made under the authority of the United States and included the premises in controversy.

1. It will be seen, on a careful examination of the instruction, that it was intended to avoid any decision of the question whether there was a subsisting and conclusive survey of the common by the authority of the United States, notwithstanding the act of the Secretary of the Interior in setting it aside, and which would prevent the assertion of any claim by the plaintiff to land not included in such survey. The meaning of the instruction is, that the claim of the plaintiff cannot be sustained without a survey which includes the property in dispute. Whether the instruction was given upon the idea that the claim to common was so indefinite as to require a survey, before the rights under it could attach to any particular tract, or upon a construction of the documents which were filed with the recorder in support of the claim, by which the court regarded the claim to common as south of the village, it is not easy to de-

termine. But if, in either or any view of its meaning, it can be sustained as correct in law, it is proper so to regard it.

The Supreme Court of the United States, in *Mackay v. Dillon*, 4 Howard, 421, says: "By the first section of the act of 1812, congress confirmed the claim to commons adjoining and belonging to St. Louis, with similar claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there anything in the act of 1812 from which a court of justice can legally declare that the land set forth in the survey, and proved as commons by witnesses, in 1806, is the precise land congress granted; in other words, the act did not adopt *the evidence laid before the board for any purpose*; and the boundaries of the claims thus confirmed were designedly, (as we suppose,) left open to the settlement of the respective claimants by litigation in courts of justice or otherwise." The survey filed with that claim was a private survey, made in 1806. The court declares that the act confirming claims of this description did not adopt any of the evidence of the claims laid before the board, but designedly left open the question of boundaries to be settled by litigation. If the question of boundary arose, and no survey by the United States authority was produced, the extent and locality of the claim confirmed could only be determined by evidence to be given on the trial of a cause, showing either a Spanish concession or other document, as a survey, giving boundaries; or the user of a particular tract, as common, under the Spanish government.

Since the decision of this case in the court below, the Supreme Court of the United States, in the case of *Guillard et al.*, v. *Stoddard*, not yet reported, has had under consideration the effect of this act of 1812, in relation to a private claim, and the opinion delivered by Mr. Justice Campbell, after reviewing the previous decisions, states as the result, "that the questions settled by the court are, that the act of 1812 is a present operative grant of all the interest of the United States in the property comprised in the act; and that the right of the

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grantee was not dependent upon the factum of a survey under the Spanish government."

After referring to the decisions made in this court upon the effect of the act of 1812, and expressing concurrence in their conclusions, the learned Judge proceeds to consider the effect of exhibiting proof of a claim to the recorder of land titles under the act of 1824, and also the consequence of a failure to exhibit such proof. He says, "this act makes it the duty of the claimants of town and village lots to proceed within eighteen months after the passage thereof, to designate them by proving the fact of inhabitation, &c., and the boundaries and extent of each claim, so as to enable the surveyor general to distinguish the private from the vacant lots. No forfeiture was imposed for a non-compliance. The confirmer, by a compliance, obtained a recognition of his boundaries from the United States, and, consequently, evidence against every person intruding, or claiming from the government *ex post facto*. The government did not by that act impair the effect and operation of its act of 1812." Again, he says, "the question of boundary, under the act of 1812, as it was decided in *Mackay v. Dillon*, was left open to the settlement of the respective claimants, by litigation in the courts of justice or otherwise. Nor has this court, in any case, decided that statutes, which operate to confirm an existing and recognized claim or title, with ascertained boundaries, or boundaries which could be ascertained, are inoperative without a survey, or made one necessary to the perfection of the title. A survey approved by the United States and accepted by the confirmer, is always important to the confirmer, for, as is said by the court in *Menard's heirs v. Massey*, 8 Howard, 294, it is conclusive evidence against the United States, that the land granted by the confirmation of congress was the same described and bounded by the survey, unless an appeal was taken by either party, or an opposing claimant, to the commissioner of the land office. This consideration depends upon the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed

to the survey, they are mutually bound and respectively estopped."

According to the decisions of the Supreme Court of the United States, the act of 1812 confirmed the lots to individuals, and the commons to the towns, without regard to the question whether there had or had not been a previous survey, and the boundaries of the claims thus confirmed were left open for proof in any litigation that might arise. In each case, the claim was confirmed, not upon the evidence filed before the board of commissioners, but as it had really existed under the Spanish government. The party asserting the confirmation under the act was obliged to show the extent and boundaries of the claim confirmed. If there was a paper title to property confirmed, the confirmation would be held of course to operate to the extent of the land embraced in such title; but if there was no such paper title, or if there was one which gave no limits to the claim, then the confirmation must rest upon proof of possession or occupancy under a claim of land within given limits.

In the case of the *St. Louis Common*, there never was a concession in any form, and the documents filed with the recorder were certain regulations by the syndicks of the town relating to the enclosures of the commons, and a survey made in 1806. The regulations gave no boundaries, and the survey was disregarded in *Mackay v. Dillon*. Yet there was an enclosure of the commons under the Spanish government, and the land within the enclosure was used as commons. Although the confirmation gave no boundaries, and no document filed with the claim, except the private survey, gave any boundaries, and the survey filed was held not to be recognized by congress, still no person ever doubted that the confirmation had a subject upon which to operate, and that it operated upon the claim as it had been evidenced under the former government, by user of the property as commons.

In the present case, the confirmation gives no boundaries; there is no grant or other document that gives any specific boundaries, yet the confirmation may be shown to apply to land

which was held, used and claimed under the Spanish government, without producing a survey by the authority of the United States. Evidence was given on the trial for the purpose of showing that a line was run under the Spanish government, dividing the commons of St. Louis and Carondelet, and including the property now in dispute within the commons of Carondelet, and that it was used as a part of that commons. It is not necessary to say what weight this evidence was entitled to; the question was for the jury. If the land was shown to be within the inclosure of the commons of Carondelet, and used as a part of the commons, it would bring it within the operation of the statutory confirmation.

If we take the documents filed before the commissioners as evidence of the locality of the claim confirmed, we find no call from which we can determine that there were not commons claimed as well north as south of the village. The answer of the lieutenant governor to the petition of Gamache is, "that the land demanded by him is within the limits of land reserved for the purpose of furnishing wood necessary for the use of the village of Carondelet, and the demand which is made by Gamache cannot take place, nor no other concession be granted in the direction of a line taken from the end of the lands of the said village, and running parallel with the Mississippi one hundred and fifty arpens further down said river." This answer is not in itself a concession. It is evidence that land was reserved for the use of the village, and that such reservation included the tract asked for by Gamache. If it be held that the declaration that no other concessions should be made between the Mississippi and a parallel line extending one hundred and fifty arpens from the end of the lands of the village down the river, amounted to a reservation of that tract as a common, still, it is not even strong evidence that land on the north of the village was not then held and recognized as a part of the common.

The instruction then given to the jury in this case, which rendered it indispensable, in order to a recovery by the plain-

tiff, that a survey by the United States, embracing this land as a part of the village common, should be produced, was not warranted by the law as declared by the Supreme Court of the United States.

2. But it has been argued that, at the time this survey of the common was made, (1834,) there existed no power in the general land office to vacate an approved survey, and, consequently, it is still to be regarded as a subsisting survey, conclusive upon the rights of parties. This record does not show how the proceeding in opposition to the survey commenced in the general land office, or who complained of it, or when the objection to it was first made. This court is deeply sensible of the importance of maintaining surveys which have been long made, and which have become muniments of title, relied upon by our citizens in their business transactions. If a power to disturb them exists any where, it is a dangerous power, the exercise of which must be carefully watched. Remarks were made upon this point in the case of the *Inhabitants of Carondelet v. Dent*, 18 Mo. Rep. 290, which are applicable to the question as presented upon this record. We will not, therefore, pass upon the question of power in the department to vacate the survey of the commons of Carondelet, without an acquaintance with all the proceedings which resulted in that act.

3. But there is one view of the case which it is proper to present, in order to facilitate its final disposition. In *Menard's heirs v. Massey*, 8 Howard, it is clearly laid down that a survey, when regularly approved, is conclusive upon the United States that the land granted by the confirmation is the same included within the survey, and that when it is accepted by the confirmee, he and the government being parties to the selection of the land, and having agreed to the survey, are mutually bound and respectively estopped. The language of the court in that case is quoted in the later case of *Guillard et al., v. Stoddard*, as stating the law.

In this case, a survey made in 1834, and approved in that year, appears to have remained as the approved and recog-

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nized survey of the commons of Carondelet until January, 1853. In the mean time, a tract of land contiguous to the common, as thus surveyed, is selected by the state as a part of the public land granted to her by congress, and the title of the present defendant, claiming under the state, is perfected by a patent dated February 27th; 1850. Here, then, the United States, many years after the survey was made and approved, and, as far as we can see, many years after the survey was accepted and acted upon by the authorities of Carondelet, have disposed of the adjoining land, and the title to it has been regularly completed.

There is evidence upon the record that the corporate authorities of Carondelet were cognizant of the making of the survey in 1834; deputed persons to attend the surveyor and to carry the chain; received the report of the persons so deputed that the survey was completed; caused a copy of the plat to be procured and exhibited as the true survey of the commons; directed the lines to be marked with stones; divided the land included in the survey into lots conforming to the exterior lines of the commons, as surveyed, and disposed of such lots; procured a certificate of confirmation of the commons to be issued by the recorder of land titles, based upon and referring to this survey; used the survey in litigation as the correct survey of the commons; thus giving the strongest evidence of consent to and acceptance of the survey.

Now, taking the law to be clear, as laid down in *Menard v. Massey*, that the parties to a confirmation may, by agreeing to the selection and survey of land confirmed, be "mutually bound and respectively estopped," this case may be easily settled by finding the fact of the consent to the survey by Carondelet, and that it stood as the approved survey when the state selected the land in dispute.

A survey regularly made and approved is conclusive upon the government that the land within the boundaries is the land granted, and the acceptance of the survey by the grantee is conclusive that *all* the land granted is within the boundaries.

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A person claiming land from the United States, outside of the survey, has the benefit of the conclusiveness of the survey against the grantee.

Still, the fact of acceptance and consent to the survey by Carondelet is a fact to be found by a jury, and however strong the evidence may be, we do not feel at liberty to determine, as a matter of law, from the evidence upon the record, that the survey was so accepted and consented to, as to estop the city in this action from claiming land outside of the survey.

As has already been said, we do not find upon the record any account of the proceeding which resulted in the act of the Secretary of the Interior which has been considered as vacating the survey. The papers which have been copied into the bill of exceptions would appear to show that the survey stood approved and without objection, and certainly without appeal for some seventeen or more years. We do not examine the question of power to vacate a survey made prior to the 4th July, 1836, when the act to reorganize the general land office was passed. (5 U. S. Stat. at Large, 107.) We do not say within what time an appeal must be taken to the higher officers of the land department, admitting the power to review and vacate a survey to exist. But we are prepared to say that, where the power exists, it must be exercised in a reasonable time, and that, after a lapse of many years, with a survey standing as an approved survey, in all the land offices, and assented to by both the parties, a title regularly acquired on the faith of the correctness of that survey, is not to be disturbed by any dispute which may arise between the parties as to its correctness.

The instruction given by the court being considered erroneous, the judgment is reversed, and the cause remanded.

FISHER & FELLOWS, Plaintiffs in Error, vs. CUTTER, Defendant in Error.

1. D. sold to B. some lard and agreed in writing as follows: "I am to ship the above lard to Messrs. F. & F., New York, for sale, and to value on them at ninety days from date of delivery of said lard, for full cost of same in favor of said B.; and above lard to be sold to meet payment of the aforesaid drafts." On the same day, C. executed to D. the following writing: "Mr. D. having this day sold to Mr. B. 417 tierces of lard, upon terms agreed upon by them, and the said D. having advanced drafts to full amount of cost of said lard, I hereby promise and agree to pay to the said D., or his order, on demand, any amount of reclamation he may have against said B., arising from sales of said lard." The lard was by D. shipped to F. & F., but by an arrangement between them and B., without the knowledge of D., was not sold to meet the drafts, which were by F. & F. otherwise provided for. Afterwards, the lard was sold for less than the amount of the drafts. D. assigned C.'s agreement to F. & F., who bring suit upon it for the reclamation. *Held*, C.'s writing was a guaranty, and to be construed in reference to the contract between D. & B.; and the guarantor was discharged by the failure to sell the lard within ninety days.

(GAMBLE, J., dissenting, holding that C.'s writing was an original undertaking, and could only be discharged by some act of D.)

Error to St. Louis Court of Common Pleas.

The case is sufficiently stated in the opinion of the court.

Mr. Kasson, for plaintiff in error, insisted upon the following points: 1. This is not, in legal language, a guaranty. It is an independent, original undertaking of Cutter. (3 Kent's Comm. 121. Smith's Mercantile Law.) 2. The contract is to be taken most strongly against the maker. (Chitty on Cont. 95, 96.) 3. But if this is to be considered a guaranty, then it is as broad as the liability of the principal, and only his discharge, or a violation of the ordinary course of trade, could discharge the defendant. (*Lawrence v. McCalmont*, 2 Howard (U. S.) 449. 12 East, 227.)

Mr. Lord, for defendant in error, made the following points: 1. The guaranty and contract are to be taken together, and as the contract contemplated a sale to meet payments at maturity, the subsequent arrangement between Butler and Fisher & Fellows

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changed the contract and discharged the surety. (Holcombe & Gholson's Smith's Mercantile Law, p. 465, note *a*. Parsons on Contracts, 502, 503 *et seq.* Burge on Suretyship, 214, 215, 216. Chitty on Contracts, (Am. ed.) p. 529 *et seq.*) 2. Cutter's agreement was, to pay any reclamations after sale of the property, but the time of sale was extended without his knowledge or consent, and this discharges him. (*Robbins v. Bingham*, 4 Johns. 476. *Walsh v. Baile*, 10 Johns. 180. See note in 3 Wheaton, p. 148, and cases there cited. *Comegys v. Booth & Bell*, 3 Stewart, 14. *Hunt v. Smith*, 17 Wend. 179. Hare & Wallace's Am. Lead. Cases, p. 149, and cases there cited.) 3. Cutter's guaranty was not intended to protect any one but Dana, whose drafts were paid by Fisher & Fellows, pursuant to the arrangement between them and Butler. (*Miller v. Stewart*, 9 Wheat. 680. 2 Penn. (Pen. & Watts,) 27. 6 Gill & J. 247. 8 Wendell, 512. 6 Hill, 540.) 4. The contract is, in its nature, special, and not negotiable. (Chitty (7th Am. ed.) 499, note 2, and cases there cited. 2 Denio, 375. 10 Johns. 179. *Penoyer v. Watson*, 16 Johns. 7 Blackf. 526.)

RYLAND, Judge, delivered the opinion of the court.

The question in this case depends on the proper construction of the instrument of writing signed by Cutter. On the 15th February, 1851, Charles Dana signs an instrument in writing, as follows: "I have this day sold Mr. S. O. Butler 417 tierces lard, rendered by Samuels & Moss, and delivered at Hannibal, Mo., upon the following terms, to-wit: at seven and one half cents per pound, the weight rendered me by Samuels & M., to be considered the true one, and tare, as marked on each package, to be considered the actual tare, delivery to be made on day of shipment from Hannibal. I am to ship the above lard to Messrs. Fisher & Fellows, New York, for sale, and to value on them at ninety days, from date of delivery of said lard, full costs of same in favor of said Butler,

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(for which, as also for shipping, I am to receive no commissions,) and above lard to be sold to meet payment of the aforesaid drafts; said drafts shall be negotiated by myself or Butler; Mr. Norman Cutter is to give his obligation to pay to me any reclamations that may accrue upon sales of above lard, on demand, and any profits that may be realized shall be paid over to Mr. Butler."

"St. Louis, Mo. Above terms accepted by S. O. Butler. February 15, 1851."

The following is the instrument of writing signed by Cutter:

"Mr. Charles Dana having this day sold to Mr. S. O. Butler four hundred and seventeen tierces lard upon terms agreed upon by them, and the said Dana having advanced drafts to full amount of costs of said lard, I hereby promise and agree to pay to the said Dana, or his order, on demand, any amount of reclamation he may have against said Butler, arising from sales of said lard.

"NORMAN CUTTER.

"St. Louis, February 15, 1851."

The lard was shipped by Dana to Fisher & Fellows, and drafts drawn on them at ninety days in favor of Butler. By arrangements between Fisher & Fellows and Butler, the lard was not sold to meet the drafts at ninety days, but was held over and the drafts met. Fisher & Fellows agreed, for $2\frac{1}{2}$ per cent. commission, to hold the lard for ninety days after the drafts came to maturity. The lard was finally sold, but not for a sufficient sum to meet the drafts, charges, commissions, &c. Dana assigned to Fisher & Fellows the guaranty of Cutter, and they bring this suit. It is agreed that neither Dana nor Cutter had any knowledge of the arrangement made by Fisher & Fellows and Butler to hold over the lard, and meet the drafts some other way. The court below found for the defendant, Cutter. The case comes here by writ of error.

1. We think the judgment below correct. In the view we take of this matter, we consider that the undertaking of Cutter must be construed in reference to the contract made by Butler and Dana. Cutter says, Dana having sold to Butler 417 tierces of

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lard "upon terms agreed upon by them," and having advanced drafts to the full amount of costs of said lard, &c. Now what were the terms which Cutter had in his mind? The lard was sold at $7\frac{1}{2}$ cents per pound, to be shipped to Fisher & Fellows; drafts at ninety days were drawn on them for the cost of said lard, and the lard was to be sold to meet these drafts. Cutter might well suppose that there would be no loss upon this shipment, if sold, and drafts met at ninety days. Therefore, upon the terms agreed upon by them, Cutter was willing to guaranty and pay for whatever reclamation Dana should have against Butler by reason of these drafts.

I do not consider Cutter's an original undertaking, but a guaranty, and a guaranty for ninety days' drafts only. No matter, then, whether Dana knew or not the arrangement between Fisher & Fellows and Butler, by which the drafts were prolonged, and the sales of the lard postponed; he was only to guarantee according to the terms of the contract between Dana and Butler.

I admit that contracts of guaranty, like all commercial contracts, have received a liberal interpretation in furtherance of the intention of the parties; but then they should never be extended beyond the obvious import of the terms in their reasonable interpretation. Justice Story said, in the case of *Miller v. Stewart*, 9 Wheat. 702: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound and no further. Courts of equity, as well as courts of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness." In *Lawrence v. McCalmont et al.*, 2 How. Rep. 449, the same judge says: "The words of such guaranty contracts should receive a fair and reasonable interpretation, and should not be forced out of their natural meaning."

Applying these rules to the case before us, and we cannot

hesitate to say, that Cutter's guaranty here has a direct relation to the contract between Dana and Butler, as it was then made—the lard to be shipped, and drafts drawn on it at ninety days, and not for 180 days. It was a guaranty against loss upon the contract as then made, and not upon any future contract which Butler might make with Fisher & Fellows. Fisher & Fellows got their pay for this change of the terms. They pay the drafts, and wait ninety days longer. Now Cutter was to guaranty against loss on the sale, that is, loss on the sale at ninety days' credit, as then made, which is equivalent to guaranteeing against loss on the drafts which Dana had drawn at ninety days on Fisher & Fellows. Surely his contract cannot be extended to a guaranty against any loss which Fisher & Fellows and Butler might cause by their after arrangements, in holding over the lard and extending the time of the drafts, by renewing them for ninety days.

We do not consider this agreement of Cutter's as an original agreement, standing alone, and to be construed without reference to the arrangement then made concerning the lard between Butler and Dana. We consider it simply a guaranty that he will pay whatever reclamation Dana may legally have against Butler, by reason of the drafts then drawn in his favor at ninety days, and it would be unjust to extend this guaranty to any other contract.

The judgment of the court below is therefore affirmed; Judge Scott concurring. Judge Gamble dissents. He considers the contract an original undertaking, and not merely a guaranty, and that it could only be discharged or released by act of Dana.

THE STATE, Respondent, vs. BYRON, Appellant.

1. An indictment of a married man for lewdly and lasciviously abiding and cohabiting with a female, under the second clause of section 8 of article 8 of the act concerning "Crimes and Punishments," (R. C. 1845,) must state that the parties lewdly and lasciviously abided and cohabited *with each other*, in the words of the statute.

State v. Byron.

Appeal from St. Louis Criminal Court.

Indictment for adultery. The second count of the indictment was precisely as follows: "And the grand jurors aforesaid, upon their oath aforesaid, do further present, that Richard J. Byron, late of St. Louis county, on the first day of January, in the year of our Lord 1853, and on divers other days and times, between that day and the day of the finding of this indictment, unlawfully and wickedly did lewdly and lasciviously abide and cohabit with one Eliza Miller, he, the said Richard J. Byron, being then and on said other days and times there a married man, and having then and on said other days and times a wife living, but the said Richard J. Byron and Eliza Miller were never married to each other; against the peace and dignity of the state."

Uriel Wright, Delafield & Kribben, for appellant.

H. A. Clover, for the State.

SCOTT, Judge, delivered the opinion of the court.

Byron, who was a married man, was indicted for living in a state of open and notorious adultery with an unmarried woman, and for lewdly and lasciviously abiding and cohabiting with the same woman, (naming her.) There were two counts in the indictment, charging these separate offences. The jury found the defendant guilty under each count, and on the first assessed the punishment at three months' imprisonment in the county jail, and on the second, at a fine of \$300. As only one offence was proved on the trial, the court granted a new trial on the first count, and thereupon the circuit attorney entered a *nolle prosequi* as to that count, and judgment was entered on the second count. A motion was made in arrest of judgment, which was overruled, and the defendant appealed.

The court would have found itself embarrassed in granting a new trial as to one count in an indictment and entering a judgment on the other, had not the difficulty been obviated by entering a *nolle prosequi* as to the count on which the new trial had been granted.

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1. The clause of the statute under which the second count is framed is in these words: "Every man and woman (one or both of whom are married and not to each other,) who shall lewdly and lasciviously abide and cohabit with each other," &c. Now the second count in the indictment, in effect, charges that R. J. Byron, being a married man, but not married to Eliza Miller, did lewdly and lasciviously abide and cohabit with the said Eliza Miller. It is plain that this count does not pursue the words of the statute. The charge should have been, that R. J. Byron and Eliza Miller did lewdly and lasciviously abide and cohabit with each other, he, the said R. J. Byron, being a married man, but not married to the said Eliza Miller.

Judge Ryland concurring, the judgment is reversed, and the defendant discharged; Judge Gamble not sitting.

THE STATE, Appellant, vs. DAVIDSON, Respondent.

1. The principal and security in a recognizance to answer an indictment acknowledged themselves *each* to be bound in a specified sum. *Held*, their liability was several and not joint, and a remission by the governor after forfeiture in favor of the principal would not discharge the security.
2. A gubernatorial remission from liability upon a recognizance to appear in one county cannot be made to apply to a recognizance to appear in a different county.

Appeal from Jefferson Circuit Court.

Scire facias upon a forfeited recognizance. The case is stated in the opinion of the court.

Mr. *Nbell*, for appellant. 1. The governor has no power under the constitution to release parties from the obligations of their recognizances. 2. If he has the power, it has not been exercised as to Davidson, whose obligation was distinct from that of Wright. Besides, the pardon has reference to a recognizance of Wright to appear in the Franklin Circuit Court, and not in the Jefferson Circuit Court.

Mr. *Jones*, for respondent. 1. The discharge of the prin-

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principal from his recognizance discharges his security. 2. A recognizance may be remitted by the governor after forfeiture. (*The Commonwealth v. Denniston*, 9 Watts, 142. State Const. art. 4, sec. 6.)

GAMBLE, Judge, delivered the opinion of the court.

Davidson became bound as the security of one Wright, in a recognizance for the appearance of Wright in the Circuit Court of Jefferson county, to answer an indictment. The recognizance was regularly forfeited, and this *scire facias* is brought to have execution for the amount. Davidson alone was served, and relies upon a remission of the forfeiture by the governor as his defence. The Circuit Court held it to be a defence.

By the recognizance, Wright, as principal, and Davidson, as security, acknowledged themselves *each* to be bound to the state of Missouri in the sum of one thousand dollars, for the appearance of Wright in the Jefferson Circuit Court, to which the indictment had been removed on a change of venue from the Franklin Circuit Court. The remission by the governor remits and discharges Wright from liability upon a recognizance for the sum of one thousand dollars, entered into by Wright for his appearance before the Circuit Court of *Franklin county*. The Circuit Court held that the remission in favor of Wright discharged Davidson.

1. As we read the recognizance, each person was bound in a sum of one thousand dollars for himself, and not that both were bound for the same one thousand dollars. To make them bound only for the same single sum, it is necessary to strike the word "each" out of the recognizance. The remission then of one of the sums is not the remission of the other. If the remission had been of the sum of one thousand dollars in favor of Davidson, the security, it is not supposed that it would be insisted that Wright, the principal, was discharged. Yet the construction of the instrument ought to be the same in each case. The obligation was several, not joint; neither was liable for the sum acknowledged by the other.

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2. The remission, moreover, was not applicable to this recognizance. There was in the record a recognizance for Wright's appearance at the Circuit Court of *Franklin* county. The one on which this *scire facias* was issued was for his appearance at Jefferson county.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

THE STATE, Respondent, *vs.* AMBS, Appellant.

1. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, secs. 31, 32, 33 and 34,) are constitutional.
2. A dram-shop license does not authorize the holder to sell liquor on Sunday.
3. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines.

Appeal from St. Louis Criminal Court.

Indictment for keeping open an ale house on Sunday, and for selling ale on the same day. The indictment contained two counts, one for keeping open and the other for selling. The defendant pleaded in bar, that, at the time of committing the acts mentioned in the indictment, he was licensed to keep a dram-shop. A demurrer to this plea being sustained, he pleaded guilty to the indictment, reserving the right to move in arrest of judgment for its insufficiency. His motion in arrest was overruled, and he was fined five dollars upon each count, whereupon he appealed to this court. The cause was submitted on printed arguments by Mr. R. M. Field, and Messrs. Delafield & Kribben, for appellant, and on a written argument by Mr. Clover, for the State.

Mr. Field, (with whom were *Delafield & Kribben*,) for appellant, argued the following points: 1. The defendant's license exempted him from the law prohibiting the sale of ale on Sunday. 1. The law on which the indictment is grounded is applicable to unlicensed persons only. 2. If applied to li-

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censed persons, it violates that clause of the constitution of the United States, which prohibits all state legislation impairing the obligation of contracts. II. The court below erred in inflicting a double penalty. 1. Only one offence was charged in the indictment. (*Crepps v. Durden*, Cowp. Rep. 640. *State v. Cottle*, 15 Maine Rep. 473. *State v. Stinson*, 17 Maine, Rep. 154. *State v. Churchill*, 25 Maine Rep. 306. *Tracy v. Perry*, 5 N. H. Rep. 504. *Kilbourn v. State*, 9 Conn. Rep. 560. *Washburn v. McInwy*, 7 Johns. Rep. 134. *People v. Adams*, 17 Wend. Rep. 475.) 2. This error of the court below is incurable. This court cannot impose a single penalty; for it would be exercising original and not appellate jurisdiction. Nor can it remand the case that the error may be corrected below. A case can only be remanded for a *new trial*. (Crim. Prac. art. 8, §17.) III. The whole system of laws designed to enforce the observance of the Christian Sabbath is unconstitutional. 1. They interfere with the rights of conscience. 2. They impose a form of religious worship. 3. They give a preference to one religious sect over all others.

Mr. *Clover*, for the State, argued the following points: I. The defendant's license was subject to the laws in force when it was granted. (*Lambert v. The State*, 8 Mo. Rep. 493.) II. A distinct offence is charged in each count of the indictment to which the defendant has pleaded guilty, and the court did not err in imposing two fines. If, however, there was error in this, this court will not reverse, but will correct the error by imposing a single fine. III. The law under which the defendant was indicted is constitutional. (*Specht v. The Commonwealth*, 8 Barr, 326. *The City of Cincinnati v. Rice*, 15 Ohio, 230. *The Commonwealth v. Wolf*, 3 Serg. & R. 50. *The State v. Williams*, 4 Tredell, 400.)

SCOTT, Judge, delivered the opinion of the court.

Peter Ambs was indicted for keeping open an ale house on Sunday, and for selling intoxicating liquors on the same day. Both offences were included in one indictment, though in sepa-

rate counts. He was convicted and fined on each count by one judgment. From this judgment, he appealed to this court.

1. The main question argued in the briefs of the counsel in this case was, the constitutionality of the law exacting the observance of Sunday, as a day of rest. It was maintained for the appellant, that the laws enjoining an abstinence from labor on Sunday, under a penalty, and prohibiting the opening of ale and beer houses, and selling intoxicating liquors on that day, were dictated by religious motives, and consequently could not be sustained, being inconsistent with the state constitution, which ordains that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support or attend any place of worship; that no human authority can control or interfere with the rights of conscience; that no person can ever be hurt, molested or restrained in his religious professions or sentiments, if he do not disturb others in their religious worship; that no preference can ever be given by law to any sect or mode of worship.

The statute compelling the observance of Sunday, as a day of rest from wordly labor, expressly provides, that it shall not extend to any person who is a member of a religious society, by whom any other than the first day of the week is observed as a Sabbath, so that he observed such Sabbath.

Those who question the constitutionality of our Sunday laws, seem to imagine that the constitution is to be regarded as an instrument framed for a state composed of strangers collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing in any common reminiscences of the past; that, unlike ordinary laws, it is not to be construed in reference to the state and condition of those for whom it was intended, but that the words in which it is comprehended are alone to be regarded, without respect to the history of the people for whom it was made.

It is apprehended, that such is not the mode by which our organic law is to be interpreted. We must regard the people

for whom it was ordained. It appears to have been made by Christian men. The constitution, on its face, shows that the Christian religion was the religion of its framers. At the conclusion of that instrument, it is solemnly affirmed by its authors, under their hands, that it was done in the year of our Lord one thousand eight hundred and twenty—a form adopted by all Christian nations, in solemn public acts, to manifest the religion to which they adhere.

Long before the convention which framed our constitution was assembled, experience had shown that the mild voice of Christianity was unable to secure the due observance of Sunday as a day of rest. The arm of the civil power had interposed. The convention sat under a law exacting a cessation from labor on Sunday. (1 vol. Edward's Compilation, 302.) The journal of the convention will show that this law was obeyed by its members as such, by adjournments from Saturday until Monday. In the tenth section of the fourth article of the constitution, it is provided that, if the governor does not return a bill within ten days, (Sundays excepted,) it shall become a law without his signature. Although it may be said that this provision leaves it optional with the governor, whether he will consider bills or not on Sunday, yet, regard being had to the circumstances under which it was inserted, can any impartial mind deny but that it contains a recognition of the Lord's day, as a day exempt by law from all worldly pursuits. The framers of the constitution, then, recognized Sunday as a day to be observed, acting themselves under a law which exacted a compulsive observance of it. If a compulsive observance of the Lord's day, as a day of rest, had been deemed inconsistent with the principles contained in the constitution, can any thing be clearer than, as the matter was so plainly and palpably before the convention, a specific condemnation of the Sunday law would have been engrafted upon it. So far from it, Sunday was recognized as a day of rest, when, at the same time, a cessation from labor on that day was coerced by a penalty. They, then, who engrafted on our constitution the prin-

ciples of religious freedom therein contained, did not regard the compulsory observance of Sunday as a day of rest, a violation of those principles. They deemed a statute compelling the observance of Sunday necessary to secure a full enjoyment of the rights of conscience. How could those who conscientiously believe that Sunday is hallowed time, to be devoted to the worship of God, enjoy themselves in its observance amidst all the turmoil and bustle of worldly pursuits, amidst scenes by which the day was desecrated, which they conscientiously believed to be holy? The Sunday law was not intended to compel people to go to church, or to perform any religious act, as an expression of preference for any particular creed or sect, but was designed to coerce a cessation from labor, that those who conscientiously believed that the day was set apart for the worship of God, might not be disturbed in the performance of their religious duties. Every man is free to use the day for the purpose for which it is set apart or not, as he pleases. If he sees proper to devote it to religious purposes, the law protects him from the disturbance of others; if he will not employ himself in religious duties, he is restrained from interrupting those who do. Thus the law, so far from affecting religious freedom, is a means by which the rights of conscience are enjoyed. It cannot be maintained that the law exacting a cessation from labor on Sunday compels an act of religious worship. Because divines may teach their churches that the reverential observance of the Lord's day is an act of religious worship, it by no means follows that the prohibition of worldly labor on that day was designed by the general assembly as an act of religion. Such an idea can only be based on the supposition of an entire ignorance in the legislature of the nature of the worship which God exacts from his creatures. A compliance with the law, induced by a fear of its penalties, could never be regarded as an act acceptable to the Deity. No act of worship, unless dictated by heartfelt love, can be pleasing to the Almighty. God listens alone to the voice of the heart.

Bearing in mind that our constitution was framed for a peo-

ple whose religion was christianity, who had long lived under, and experienced the necessity of laws to secure the observance of Sunday as a day of rest, how remarkable would it have been that they should have agreed to make common, by their fundamental law, a day consecrated from the very birth of their religion, and hallowed by associations dear to every Christian. Convert Sunday into a worldly day by law, and what becomes of Christianity? How can we reconcile the idea to our understanding, that a people professing Christianity would make a fundamental law by which they would convert Sunday into a worldly day? It would have been an act of deadly hostility to the religion they professed, exposing it to the danger of being reduced to the condition in which it was before the Roman world was governed by Christian princes. Though it might not be persecuted by the arm of the civil power, it would be driven by the annoyances and interruptions of the world to corners and by-places, in which to find a retreat for its undisturbed exercise.

How startling would the announcement be to the people of Missouri that, by their organic law, they had abolished Sunday as a day of rest, and had put it out of the power of their legislators ever to restore it as such! With what sorrow would the toil-worn laborer receive the intelligence that there was no longer by law a day of rest from his labor! The poor beasts of burden would soon find by experience, that our laws were no longer tempered by the softening influences of Christianity, and all the social advantages, which great and good men have attributed to the observance of Sunday as a day of rest, would be taken away.

In conclusion, we are of opinion that there is nothing inconsistent with the constitution, as it was understood at the time of its adoption, with a law compelling the observance of Sunday as a day of rest. The constitution itself recognizes that day as a day of rest, and from the circumstances under which it was done, we are warranted in the opinion, that a power to

compel a cessation from labor on that day was not designed to be withheld from the general assembly.

2. A law compelling the observance of Sunday as a day of rest has always been in force under our state government. A license granted by the state must be construed in reference to this law. A dram-shop keeper who should open his shop and entertain his customers on Sunday, as on other days, would violate the Lord's day act. He is in no worse condition, so far as the authority to sell on Sunday is concerned, because the offence of keeping open a dram-shop on that day is specifically denounced by an act of the legislature. That act was passed, not because to keep open a drinking house on Sunday was no offence, but that such offence might be visited by a heavier penalty than was inflicted for a violation of the Lord's day act. The argument against this view of the subject is founded in a mistake as to the Sunday law of 1835. The penalty for a violation of that act was five, and not fifty dollars, as was stated.

3. The appellant complains that there was error in assessing a fine for keeping open his ale house, and also one for selling liquors; that the two acts constitute but one offence, and only one penalty was incurred. The words of the act are: "Every person who shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, shall, on conviction, be fined not less than fifty dollars." From this provision, it is clear that the keeping open of an ale-house on Sunday is an offence. It is equally clear that the selling or retailing of any fermented or distilled liquor on that day is an offence. Each of these offences is set forth in a separate count in the indictment. Let the act construe itself. The 31st section prohibits labor on Sunday under a penalty of five dollars. The 33d section imposes a fine of fifty dollars for horse racing, cock-fighting, playing at cards, &c., on Sunday. Then comes the section under consideration. Now, suppose a person on Sun-

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day morning plows his field, runs a horse race at noon, and at sun-set plays a game of cards, will not three penalties have been incurred, as much as if these acts had been done by different individuals? As the opening of an ale-house, and the selling of distilled liquors on Sunday are different offences, why may not several penalties be incurred for their commission? They are charged as separate misdemeanors in the indictment, and the appellant has confessed them as such.

The other judges concurring, the judgment will be affirmed.

A motion for a rehearing of the above cause was filed and overruled.

[END OF OCTOBER TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

JANUARY TERM, 1855, AT JEFFERSON CITY.*

McQUEEN, Respondent, *vs.* CHOUTEAU'S HEIRS, Appellants.

1. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring defendants before the court to defend for all parties interested.
2. Under the chancery practice which formerly prevailed, an answer, if responsive to the bill, was to be taken as true, if no replication was filed.
3. Where a tenant disclaims the title of his landlord, and asserts a title in himself, he cannot, when defeated, receive compensation in a court of equity for improvements.
4. A contract to convey to A. a quarter section of land, *to be selected by him*, cannot be assigned to B. so as to entitle him to make a selection.
5. Where a party files a bill in equity for the specific performance of a contract for the conveyance of land, knowing at the time that it is not in the power of the defendant specifically to perform the contract, the court will not, in ordinary cases, decree to him compensation in damages, but will leave him to his remedy at law for a breach of the contract.

*The July term, 1854, having lapsed, the cases upon the docket of that term were heard and decided at the present term. Judge LEONARD sat in the following cases only at this term, viz: Chouteau Spring Company *v.* Harris. Smith *v.* Ashby. Stone *v.* Corbett. Dowd *v.* Winters. Hull *v.* Dowdall. State *v.* Rich & Rich. State *v.* Upton. All the other cases were decided by the concurrence of Judges SCOTT and RYLAND.

Appeal from Audrain Circuit Court.

This was a bill in equity filed in the Pike Circuit Court in 1844, by McQueen against the heirs of Auguste Chouteau, for the specific performance of a contract to convey a quarter section of land.

On the 25th of June, 1829, the administratrix of Auguste Chouteau leased to John J. Grimes, for the term of one year, for the annual rent of one dollar, a league square of land granted to said Chouteau by the Spanish government, but then unconfirmed. The league square comprehended four quarter sections, the grant having been disregarded by the United States surveyors. On the same day, the heirs of Chouteau entered into an agreement under seal with Grimes, by which, after reciting the lease from the administratrix, it was stipulated that, if the title of said heirs should be confirmed by the United States, they would make to Grimes a good title to one of the quarter sections *to be selected by him*, he paying therefor at the rate of three dollars per acre, "one half in cash at the delivery of the deed, and the other half twelve months afterwards." If the claim of the heirs should not be confirmed, but they should be entitled to a preëmption right on account of the improvements made and to be made upon the land, then they covenanted to convey to Grimes one fourth of the land to which they should thus become entitled, at the same rate and upon the same conditions that they should obtain it themselves. Grimes, on his part, covenanted to clear, improve and cultivate enough of each of the four quarter sections to entitle the heirs to a preëmption right to all of them, in case their claim should not be confirmed. He covenanted not to cut any timber, except such as he might want for his improvements and the support of his farm. If the heirs should fail to make a good title to Grimes, according to the provisions of the agreement, upon the tender of the money, then they covenanted to pay Grimes for his improvements according to a valuation by three disinterested persons.

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Under this lease and agreement, Grimes entered into possession of the land, and made improvements. In 1832, he sold his improvements to McQueen, the complainant, and assigned to him all his interest in the agreement. McQueen entered into possession and made further improvements. The league square was subsequently confirmed to the heirs of Chouteau. Partition was made among the heirs, and the legal title to the entire tract vested in Thomas F. Smith, one of the defendants, for the benefit of all the heirs.

The bill, after setting out the facts, averred that both Grimes and the complainant had kept all the covenants in the agreement on their part; that the defendant, Smith, had told the complainant that he was willing to comply with the agreement by conveying one of the quarter sections, and that he had a power of attorney from the other heirs to do so; "that complainant informed Smith that he was ready to take the conveyance and pay down one half of the consideration money, but that Smith did not offer to make the deed nor exhibit his power to do so." The complainant, in his bill, made selection of a particular quarter section, and prayed a decree for a specific performance, if it should be found that the defendants could make a good title; if not, he prayed a decree for the value of his improvements and for general relief.

The defendants answered, admitting the agreement, but denying that the complainant had complied with his part of it. They charged that he had committed waste; that Smith, who held the title, had offered to convey to him a quarter section if he would pay down half the consideration money, but that he had neglected to do so; and that, instead of complying with the agreement and purchasing one of the quarter sections, the complainant had claimed title in himself to the whole of them under a pretended and fraudulent preëmption right, and in an action of ejectment brought by Smith, had set up said fraudulent title as a bar. They also alleged that there were other heirs of Auguste Chouteau who had not been made parties to the suit.

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At the April term, 1848, upon a petition filed by the complainant, setting forth that, by reason of the death of some of the original defendants and the marriage of others, the parties had become so numerous as to render it difficult, if not impossible, to bring them all before the court, an order was made directing the defendants already before the court to defend for the others.

At the April term, 1849, the cause was taken by change of venue to Audrain county. Upon the hearing at the October term, 1852, the complainant read in evidence the lease from the administratrix of Chouteau to Grimes, the agreement between Chouteau's heirs and Grimes, and the assignment thereof to the complainant. He then proved the value of his improvements. It was admitted that the defendants had conveyed away the land before the filing of the bill, so that it was not in their power to make a title to the plaintiff for any portion of it. The defendants gave evidence tending to show that the complainant never had made a tender of any portion of the purchase money. There was evidence tending to show that the complainant had committed waste upon the land, and evidence to the contrary. The defendants read in evidence the record of an ejectment suit brought by Smith against complainant, for the four quarter sections, in which he had filed a plea of "not guilty" and in which there was a judgment for the plaintiff.

The defendants asked the court to declare the law to be, that the contract between Grimes and the defendants could not be assigned, and that the complainant could not have a decree unless he proved a tender. These declarations were refused, and the court declared that the contract was assignable in equity, and that no tender was necessary, "if the defendants had shown a determination not to perform the contract, or had deprived themselves of the power of performing it."

A decree was rendered in favor of the complainant for \$1350 as the value of his improvements, and the defendants appealed to this court.

Glover & Richardson, (with G. Porter,) for appellants.

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If the complainant was entitled to a decree, it was either because, at the institution of the suit, the contract set out in the bill was a subsisting one which he had performed on his part, or because it had been rescinded, and the parties, at the time, were mutually entitled to receive back what had been advanced on the faith of it. The decree cannot be sustained on the ground of *performance* by the complainant, because: 1. No tender of one half the purchase money is alleged in the bill. The payment or tender of the money was a precedent condition to the acquisition of an interest in the land he was to select. A court of equity cannot relieve against the non-performance of a precedent condition. (15 Vermont, 757. 2 Sandf. Ch. Rep. 78. Walk. Ch. Rep. 405. 6 J. J. Marsh. 263. 3 Gill & John. 265. 1 J. C. R. 370.) 2. The bill shows that no *selection* was made, as required by the contract. 3. If the averments of the bill were sufficient, they were denied by the answers, which were to be taken as true, no replications having been filed. 4. Even if replications had been filed, the *evidence* showed that there had been no performance.

The decree cannot be sustained on the doctrine of rescision, because the bill was not framed on that view. Even if it had been, the decree is erroneous in not giving to the appellants the benefits which belong to a case of rescision. When a contract is rescinded, the parties must restore to each other what they have respectively received under it. (6 Gill & Johns. 435. 2 Dana, 374. Id. 469. 4 Dana, 507. 1 A. K. Marsh. 434. 5 J. J. Marsh. 207. 4 Ohio, 229. 2 J. J. Marsh. 520. 5 Dana, 166.) The decree gives the complainant the value of his improvements, and nothing was allowed to defendants for the use of their land for nearly fifteen years.

McQueen was entitled to no compensation for improvements, because he made them in bad faith. He made them for himself, not for the defendants. He attempted to hold the land by his fraudulent preëmption right.

The court erred in making the order that a portion of the defendants should defend for the rest.

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Mr. *Broadhead*, for respondent. 1. The contract set forth in the bill is assignable. (Story's Eq. Juris. p. 366, §1040.) 2. Complainant was not bound by the terms of the contract to tender the money for the quarter section he might select, if he knew the heirs were not able to make him a conveyance of said land, free from all incumbrances. 3. Complainant was not bound to tender or pay the money until defendants were ready to make him a deed; and if they were not prepared to make him a deed, he might resort to his other alternative under the contract, and claim the improvements.

SCOTT, Judge, delivered the opinion of the court.

1. The irregularities committed in the progress of this suit are such as cannot be sustained. When a bill is filed for a specific performance of a contract for the conveyance of lands, we are not aware of any principle of the law governing courts of equity, which warrants the order that was made on the application of the complainant, that the defendants then before the court should answer and defend for all the defendants in the cause. In some cases, as in the instance of creditors seeking an account of their deceased debtor's estate, for the payment of their demands, a few suing on behalf of the rest may substantiate the suit, and the other creditors may come in under the decree. So a bill may be brought by a lord of the manor against some of the tenants, or by some of the tenants against the lord, upon a question of common; or by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general modus. (Harrison's Chan. 1 vol. 77.) But no case can be found, in which such permission was given in a suit of the character of that now under consideration.

2. This was a suit instituted before the present practice act went into operation; consequently, it was subject to the laws in force governing chancery practice before that event. No replications were filed to the answers. In a hearing on such a state of pleadings, the answer is taken for true, if responsive to the bill.

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3. The fact is set up in the answer that McQueen disclaimed the relation of tenant or purchaser under Chouteau's heirs. He withstood an action of ejectment and set up a title in himself. This does not consist with the fact that, as assignee of Grimes, he made the improvements for which he claims compensation. If he had really considered himself as the assignee of Grimes, and claimed as such, it was singular that he should defend the ejectment. Why did he not let judgment go in that action, and, enjoining the proceedings on it, show his equitable title to one of the tracts, and not claim all four of them, as he did? But it was not until he was defeated in a regular action at law, in which he asserted a right adverse to Chouteau's heirs, that he thought about the contract made by Grimes with the defendants. The fact of his taking an assignment avails nothing in opposition to such conduct. If he acted in bad faith towards the defendants, and made his improvements with a determination to hold the land in despite of them, he cannot now complain that they withhold compensation for those improvements.

4. But what is deemed conclusive in bar of the right of the complainant is, the consideration that the contract was not assignable in the way in which it was effected. Chouteau's heirs stipulated to convey one of the four quarter sections, at the choice of Grimes. Now the right of choice is not assignable. It is strictly personal. The contract that the heirs would convey the quarter section selected by Grimes, is different from one to convey the quarter section made choice of by the complainant. Grimes and McQueen could not change the contract, and then insist on its performance by parties to it, who did not consent to the change. The defendants have a right to say, this is not the contract into which we entered. If Grimes had made the improvements on the four quarter sections, which would have entitled Chouteau's heirs to a right of preëmption, then he should have made choice of one of them, and assigned it to McQueen. But by the case as made, it appears that the right of election was assigned to McQueen, which it is clear could not be done.

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5. It was admitted on the hearing of this cause that, before this suit was brought, the defendants had conveyed away the land in controversy. They had offered previously to convey to McQueen, on his compliance with the terms of the contract. This he failed to do. In cases similar to this, courts of equity have refused to decree a specific performance of the contract, and have refused to entertain the bill for the purpose of compensating the complainant for damages, but have left him to his action at law on the agreement. In the case of *Hatch v. Cobb*, (5 J. C. R. 559,) it is said that it is doubtful how far the court has jurisdiction to assess damages merely in such a case, in which the plaintiff was aware, when he filed his bill, that the contract could not be specifically performed or decreed, as it was a matter of legal cognizance; that though equity, in very special cases, may possibly sustain a bill for damages on a breach of contract, it is clearly not the ordinary jurisdiction of the court. This doctrine is confirmed in the subsequent case of *Kempshall v. Stone*, (5 J. C. Rep. 193,) in which it was held that a defendant, who had entered into an agreement with the plaintiff for the sale of a lot, and who, after the time of performance had elapsed, sold and conveyed the land to a third person for a valuable consideration, without notice of the agreement, and before the filing of a bill by the complainant for a specific performance of it, would not be compelled to a specific performance, but that the plaintiff's remedy was at law, for a compensation in damages for the breach of the agreement.

Judge Ryland concurring, the decree will be reversed, and the bill dismissed.

ROBINSON *et al.*, Appellants, *vs.* RICE *et al.*, Respondents.

1. It has been repeatedly held that, under the new practice, multifariousness is still an objection to a pleading. Different causes of action against different parties cannot be joined.
2. A husband in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser.

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3. Under the new practice, a party cannot state one cause of action, and ask that, if it proves unfounded, another cause of action may be tried. That is not a joinder of several causes of action.
4. Where a vendor is in possession of personal property, and sells for full value, a warranty of title is implied.
5. Where a cause is tried by a court without a jury, the supreme court will affirm if the facts found support the judgment, without regard to the instructions given or refused.
6. The supreme court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are only referred to in the record by line and page of the original.

Appeal from Cole Circuit Court.

This was an action under the new practice, commenced by the widow and heirs of James F. Clendenin, against S. O. Rice, and the heirs of Jane Lowe, and against S. O. Rice and Perry Askens, guardians for some of said last named heirs, for the specific recovery of two slaves, named Matthew and Mary, children of a negro woman named Emily.

In 1829, Joab Barton died, leaving a last will, by which he bequeathed Emily and her increase to his daughter, "Jane Lowe, wife of Charles Lowe, for and during her natural life, and after her death, to her children, in full property forever." After the death of Barton, Lowe took possession of Emily, who afterwards gave birth to two children, Mary and Charity. About 1836, Lowe sold and delivered Emily, Mary and Charity to James F. Clendenin, for the sum of \$650. Afterwards, Emily gave birth to Matthew and two other children. In 1842, Clendenin sold Emily and her two youngest children to one Overton. The petition states that Charles Lowe died about the month of February, 1846, and that his wife, Jane Lowe, died about the same time. The answer admits that Lowe and his wife died about the time stated in the petition; but in a subsequent part of the answer, it is alleged that Jane Lowe died on the 25th of January, 1845, and the court found that both Lowe and his wife died in 1845. The slaves, Mary, Matthew and Charity remained in possession of Clendenin up to his death, in January, 1846. About 1849, William Morrison and his

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wife, Mary, daughter of J. F. Clendenin, removed to Texas and took Charity with them, and had not returned at the commencement of this suit. Clendenin, at his death, left three children, and a widow, who afterwards intermarried with Isaac L. Robinson. Robinson and wife and Morrison and wife, together with the other two children of Clendenin, were the plaintiffs in this action. The slaves, Mary and Matthew, remained in possession of the widow, administrator and heirs of Clendenin after his death until March 10, 1851, when they came into possession of S. O. Rice, one of the defendants. Rice was guardian of two of Lowe's children, and it would appear from the answer that he married one of Lowe's daughters, although it is not distinctly alleged, nor was there any proof upon the subject. Letters of administration were granted on the estates both of Lowe and Clendenin, and they had been finally settled when this suit was begun. Lowe left some personal estate, which was distributed among his heirs at the close of the administration, and also real estate which descended to his heirs.

The plaintiffs, in their petition, stated that the defendant, Rice, wrongfully obtained possession of the slaves and unlawfully detained the same. They prayed judgment for their restitution, and damages for the unlawful detention. The petition then proceeded to state that when Lowe sold the slaves to Clendenin, he executed a bill of sale containing a covenant of warranty, which had been lost.

The plaintiffs claimed that Clendenin acquired an absolute estate by the purchase from Lowe, and that they, as his heirs, were entitled to the slaves; but if the court should be of a different opinion, then they prayed a decree against the heirs of Lowe upon his covenant of warranty.

The defendants answered, setting up title under the will of Joab Barton. They alleged that the plaintiff, Robinson, carried the two slaves named in the petition to Arkansas, and when pursued, voluntarily delivered them up to the defendant, Rice, upon demand, without any force being used. They admitted the

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sale from Lowe to Clendenin, but insisted that Lowe only sold an estate for his wife's life, and denied any knowledge of a bill of sale with warranty. In conclusion, they prayed judgment for the return of Charity or for her value, for the value of her hire from the death of Jane Lowe up to the present time, for the hire of Mary from the same date up to the time when she came into possession of Rice, and for the expenses of Rice in getting Mary and Matthew back from Arkanaas, whither they had been taken by Robinson.

The record shows that a motion to strike out portions of the answer, which are referred to merely by line and page of the original, was overruled. The cause was heard by the court without a jury, and the facts found substantially as above stated. It was found as a fact that when Lowe sold to Clendenin, he executed a bill of sale containing a covenant of warranty. It was admitted that a suit was pending in Callaway county by the defendants against Overton, for the recovery of the slaves sold to the latter by Clendenin. During the progress of the trial, exceptions were taken to the admission and exclusion of evidence, which it is not thought necessary to notice. At the close of the evidence, several declarations of law, in the form of instructions, were asked on both sides, some of which were given and some refused. The court declared that neither plaintiffs nor defendants were entitled to any relief, and dismissed the petition, from which judgment the plaintiffs appealed.

Morrow, White and Parsons, for appellants. 1. The motion to strike out so much of the answer as relates to the alleged torts and conversions of Morrison and Robinson should have been sustained. The other appellants could not be affected by wrongful acts to which they were not parties. This part of the answer surely cannot be sustained by the law of set-off. The objection applies with equal force to the claim for hire. (New Practice Act, art. 6, sec. 7. *Sappington v. Jeffries*, 15 Mo. Rep. 630. *Nidelet v. Wales*, 16 Mo. Rep. 214.) 2. This court held in *Freeman v. Freeman & Challis*, (9 Mo. Rep.,) that the husband is in law trustee of his wife's

property, unless another trustee is appointed. This being the case, the sale by Lowe passed the title. If he was guilty of a breach of trust, his estate was amply sufficient to compensate the heirs of the wife in damages. The evidence shows that this was a *bona fide* sale. There is no evidence of notice of the will. It was not recorded, as required by law. (R. C. 1825, 792, sec. 9. 2 Story's Eq. 289, 290.) 3. The heirs of Lowe are bound by his covenant of warranty, even though not expressly named in it; and Lowe's estate having descended and been distributed, they are liable to the extent of the value of the property descended or distributed. (*Booth v. Starr*, 5 Day's Rep. 419. *Boyce v. Burnet*, 12 Mass. 410. *Hutchison v. Stiles*, 3 N. H. Rep. 408. 1 Little's (Ky.) Rep. 397. 20 Pick. 2. 3 Murphy 580. 2 B. Monroe, 63. 4 Kent, 419.) This being a sale of personal property for a fair price by the party in possession, the law implies a warranty of title. (2 Kent, 478.) 4. The dismissal of the plaintiffs' petition leaves them without relief, and still liable upon their ancestor's covenants of title for the slaves sold to Overton, if any such covenants are outstanding. 5. The appellants having obtained possession of the slaves lawfully, under the belief that their title was good and absolute, cannot be required to account for their hire, until after a demand by some person having a better title.

Edwards and Gardenhire, for respondents. 1. Lowe's heirs were not bound by his covenant of warranty unless expressly named in it. (Rawle on Covenants, 438. Smith on Contracts, 20, 21. *Loyd v. Thursby*, 9 Mod. 163.) 2. The plaintiffs' suit was properly dismissed. They were asking equitable relief against the heirs of Lowe upon his warranty, and yet they did not offer to return the slave, Emily, and her two children sold to Overton, nor Charity, who had been carried to Texas by two of the plaintiffs. Those who ask equity must do equity. 3. The other defendants are not liable for the trespass of Rice, if the action is sought to be maintained on that ground.

SCOTT, Judge, delivered the opinion of the court.

1. This is a proceeding under the 8th article of the present practice act, respecting the claim and delivery of personal property. Samuel O. Rice is the only person complained of as committing the alleged grievance, in taking away the two slaves for whom suit is brought. This being the nature of the complaint, it is difficult to perceive why so many others were made defendants. There is certainly a misjoinder.

It has been repeatedly held that multifariousness is an objection which is not taken away by the present practice act. If the defendant, Rice, has trespassed, why keep the other parties in court, waiting the trial of an issue in which they have no concern? The petition shows no right in Rice to take the slaves. As guardian, he had no right to sue in his own name to recover slaves belonging to his wards, which slaves had never been in his possession. Rice could not be sued in trespass as a guardian, for his own act. If he committed a trespass, he was liable for it in his own right, and could not qualify his wrong by maintaining that he did it as a guardian. It does not appear that Rice had any claim in right of his wife. Indeed, it is not shown that he married one of Lowe's daughters.

2. But, although it is shown that Rice had no right to take the slaves, yet, as the plaintiffs claim under James F. Clendenin, who purchased from Charles Lowe, who only had an estate in the slaves during his wife's life, and as Lowe's wife was dead, they had no right to recover them. There is no ground for the assumption, that Lowe was a trustee for his wife, and as trustee, was competent to convey the legal title to the slaves to a *bona fide* purchaser. The case of *Freeman v. Freeman & Challis*, (9 Mo. Rep.,) is not in point. That case only maintains that, where there is separate property settled on the wife, and no trustee is appointed, the law will make the husband a trustee. Here there was no separate property in Mrs. Lowe: there is nothing to show that any such thing was contemplated by Joab Barton. The slave was given to his daughter during

her life, and by operation of law, that gift passed the property to the husband. But even if the husband was trustee, and could pass the legal title, yet he could only pass such title as he held as trustee. Now, it is not pretended that his wife had more than a life estate in the slaves. At her death, they vested in her children, who thereupon had an immediate right to the possession of them. It appears from the pleadings that James F. Clendenin died before Lowe's wife; if so, his estate would be liable only for those slaves which were disposed of by him during his life-time, or which came to his administrator. Lowe had a right to sell the slaves for his wife's life-time, and during her life-time, Clendenin's possession was lawful. If Charity was run off after the death of Clendenin, before the assertion of an adverse claim to her by his representatives, his estate would not be liable for her value.

3. It is to be regretted that Clendenin's heirs did not bring an action at once on the warranty. The principle is not perceived on which they can claim the slaves in controversy, and ask at the same time, that, if their claim is defeated, then that they may recover on the warranty of title. That would not be a joinder of several causes of action. It is the setting up of one claim, and asking that, in the event it should turn out unfounded, then that another cause of action might be tried. Parties must ascertain the nature of their demands before they go to law. The will of Joab Barton, beyond all controversy, gave only a life estate in the slaves to Mrs. Lowe. At her death, they belonged to her children, and the only recourse of the plaintiffs, if they had any, was on the warranty made by Lowe to Clendenin.

4. Where the vendor is in possession of personal property, and sells it for full value, the law implies a warranty of title. Whether Lowe sold the slaves absolutely, or only his life estate in them, was a question to be determined by the evidence in the cause. Whether there would be a recovery on the warranty might, in part, depend on the result of the suit against Overton for the slaves sold to him, and, whether any thing had been done by

James Clendenin or his administrator, which rendered his estate liable for the value of the slave Charity. Certainly, if any of the slaves have been lost to Lowe's heirs, through the fault of Clendenin, it would constitute a counter claim to the demand of the plaintiffs for relief on the warranty. Morrison, by running off one of the slaves, on the termination of Clendenin's interest in her, would not subject his co-heirs to a claim for her value.

5. The practice now is, not to review the instructions given or refused when the cause is submitted to the court for trial. This court, in such cases, looks at the facts found, and if they warrant the judgment pronounced, that judgment will be affirmed, without regard to the instructions given or refused.

6. There is nothing in the objection, that the court refused to strike out a part of the defendants' answer. Even if there was, the point is not saved in such a way as that it can be noticed. The part objected to is designated by a reference to the paging of the original answer, which does not correspond with the paging of the record in this court.

There is nothing in the points about the admission or rejection of evidence which affects the judgment below, in our opinion. Upon the whole, we see no reason for disturbing the judgment of the court below on the merits of the case as presented. In order to avoid future difficulty, the judgment will be reversed, and a judgment entered dismissing the plaintiffs' action, without prejudice to a suit on the warranty, should they see proper to bring one, the appellants paying costs; Judge Ryland concurring.

GOLAHAR, Plaintiff in Error, *vs.* GATES, Defendant in Error.

1. A party who is prosecuted, (under sections 59 and 60 of article one of the act concerning roads and highways, R. C. 1845,) for obstructing a public way over his own land, may show that his property has not been condemned for public use in the manner prescribed by law.

Error to Moniteau Circuit Court.

This was an action commenced before a justice of the peace in Morgan county, by Golahar, road overseer, to the use of his road district, against Gates, to recover the statutory penalty for obstructing a county road. The cause was taken by appeal to the Circuit Court, and afterwards, by change of venue, to the Circuit Court of Moniteau county.

At the trial, the plaintiff read in evidence a transcript of the record of proceedings in the Morgan county court, at the May term, 1850, consisting of the report of the commissioners appointed at a previous term to view and locate the road, together with the approval thereof by the court and the order for the establishment of the road. The commissioners, in their report, after designating the route of the road, state that it "probably touches on the corner of Gates' land. If it runs over any of Mr. Gates' land, which we do not know that it does, we did not obtain said Gates' consent." The record states that the report "was read in open court, and no objections being made in a legal form, said report was approved and ordered to be recorded, and said road be declared a public route and highway, and that it be opened twenty feet wide as the law directs." The clerk of the county court testified that the defendant was present when the commissioners made their report, and objected to the establishment of the road, but the court overruled his objections and he excepted. There was evidence that the road, as opened, ran through defendant's land, and that he closed the same up by building a rail fence across it.

The court instructed the jury that the defendant, in this action, was liable, if the road was established by the judgment of the Morgan county court, without regard to any informality or irregularity in the proceedings, and refused a contrary instruction. After a verdict and judgment for the plaintiff, the defendant prosecuted this writ of error.

Edwards & Parsons, for plaintiff in error, relied upon *Cooper County v. Geyer*, (19 Mo. Rep.)

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SCOTT, Judge, delivered the opinion of the court.

Golahar, as road overseer, instituted this proceeding in a justice's court against Gates, under the 59th and 60th sections of the act concerning roads and highways, approved 26th March, 1845, for obstructing a highway. The cause was taken by appeal to the Circuit Court, where, on a trial, there was a judgment against Gates, on which he sued out this writ of error.

1. Although, on an indictment against a road overseer, it is sufficient to show that the road, whose want of repair has caused the prosecution, is used as a public highway, yet, when an individual is prosecuted for obstructing a public way over his own land, it is competent for him to show that his property has not been condemned for public use in the manner prescribed by law. It is the doctrine of this court that, if the rights of any person are compromised by any proceedings to which he is no party, and of which he has no knowledge, and consequently from which he can take no appeal, he may, in a collateral action, impeach the validity of such proceedings, and have their nullity judicially declared. The road, for whose obstruction this proceeding was instituted, had been but recently opened. It passed over the defendant's land, and the commissioners appointed to make the review returned the fact that he did not give his consent to the opening of the road. None of the steps required by law were thereupon taken by the county court, in order to have his land condemned; but that body proceeded as though his consent had been lawfully obtained. It is obvious that, if such proceedings are tolerated, a person may be deprived of his property against his consent, without the least color of authority. Under such circumstances, to hold that he could not assert the nullity of the proceedings in a collateral action, would be to deprive him of all redress whatever.

Judge Ryland concurring, the judgment will be reversed.

Riggs v. Myers.

RIGGS *et al.*, Respondents, *vs.* MYERS *et al.*, Appellants.

1. A will described land devised as the "south-east and south-west quarters of section 4, in township 60, range 38, in Holt county, Missouri." The devisee of the south-west quarter was to have access to the "Big Spring." Held, parol evidence that the corresponding quarter sections of township fifty-nine, in the same range and county, were intended to be devised, was admissible, it appearing that the "Big Spring" was upon the south-east quarter of section 4, in township fifty-nine, and that the testator never owned or claimed any land in section 4 of township 60.

Appeal from Holt Circuit Court.

This was a suit brought by a portion of the heirs at law of George Stewart, deceased, for a partition of the south-east and south-west quarters of section four, in township fifty-nine, range thirty-eight, in Holt county, Missouri, as to which the said George Stewart was alleged to have died intestate. The defendants claimed that George Stewart, by his last will, devised the whole of said land to Mary, James and George W. Stewart, from whom they had purchased.

The only provisions in the will of George Stewart material to this case are the following :

1. It is my will and desire that all my just debts and the expenses of my last illness be first promptly paid, and the residue of my estate be divided as hereinafter mentioned.

2. To my wife, Mary Stewart, I give the entire use and enjoyment of the south-west quarter of section four and the south-east quarter of section four, in township sixty, of range thirty-eight, lying in Holt county, Missouri, during her natural life, to have and to hold the same, and at her decease, to pass as hereinafter mentioned.

11. To my son, George W. Stewart, I give, at the decease of my wife, Mary Stewart, the south-west quarter of section four, in township sixty, of range thirty-eight, in Holt county, Missouri, with the privilege of using the water of the "Big Spring," having free access to and from it, as he may wish.

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12. To James Stewart, I give the south-east quarter of section four, in township sixty, of range thirty-eight, in Holt county, Missouri, to have the same at the decease of my wife, Mary.

In addition to the above, there was a devise to Robert S. Stewart, of a quarter section of land upon which he lived, and a small pecuniary legacy to several of the testator's children and grand children. These were all the provisions of the will.

The defendants in their answer alleged that the draftsman of the will used the word "sixty" by mistake, instead of "fifty-nine," in the number of the township. At the trial, the defendants offered to prove that George Stewart, at the time of his death, owned no other land than the two quarter sections described in the petition and the quarter section devised to Robert S. Stewart; that he never owned or claimed any land in section four of township sixty; that there was no such land as the south-east and south-west quarters of section four, in township sixty, it being a fractional section, containing less than one hundred acres, and not subdivided into quarter sections; that the spring, commonly known as the "Big Spring," was located upon the south-east quarter of section four, in township *fifty nine*, range thirty-eight; that George Stewart died upon said last named section; that his sons, George W. and James Stewart, always resided with him, and that his other children lived apart from him for many years before his death; and that the two quarter sections of land in controversy composed at least three-fourths in value of his whole estate.

All this evidence was excluded, and after a judgment of partition, the defendants appealed to this court.

W. P. Hall, for appellants. The court erred in excluding the evidence offered by the defendants. In order to ascertain the testator's intention, we must look at the whole will, and must also inquire into all the circumstances which surrounded him when he made his will. Parol evidence as to the nature, marks, qualities, &c., of the subject devised is always admissible. (1 Greenl. Ev. §286-7, 289. *Smith v. Bell*, 6 Pet. 74.

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13 Pet. 89. 7 Met. 205, 208, 209. 7 Met. 418. 2 Starkie's Ev. 753, 768-9, 770, 1268. Wigram on Ev. §9, 17, 61, 62, 64, 67, 70, 76, 105, 180.) The evidence was admissible under the rule, "*falsa descriptio non nocet, cum de corpore constat.*" After rejecting the name of the township, enough remains in the will to show the property intended to be devised. (2 Vernon, 593. 1 Vesey, sr., 254. 1 Vesey, jr., 259. 3 Vesey, jr., 306. 3 Watts, 391. 2 Greenleaf's Rep. 325. 9 N. Hamp. 58. 4 Mass. 205. 6 Johns. Ch. R. 607. 2 Dana, 49. 22 Wend. 150. 21 Wend. 653. 19 Johns. 449. 1 Wend. 548. 1 Richardson, 140. 2 Story, 286. 5 Greenl. Rep. 325. 2 N. Hamp. 285. 7 Vermont, 511. 13 Maine, 114. 8 East, 160. 1 Greenl. Ev. §301. 5 N. Hamp. 58. 22 Pick. 410. 4 Metcalf, 84. 2 Starkie's Ev. 770.) The evidence was admissible under the rule that parol evidence is admissible to explain a latent ambiguity. The description in the will applies to no object in every particular, but in some particulars it applies to one object, and in some to another. (1 Phill. Ev. 531, 532, 533. 6 Peters, 345. 9 Howard, 484. 5 Mees. & Wels. 363, 367. 5 Eng. Com. Law Rep. 408. 1 Johns. Ch. Rep. 190. 3 Taunton, 155. 2 Russ. & Mylne, 232. 3 Halstead, 72. Wigram on Ev. §184, 186.)

Mr. *Vories*, for respondents. The evidence offered by the defendants was properly excluded. The intention of the testator is to govern, but it must be gathered from the words used by him in his will, and effect must be given to every clause and word in the will. Parol evidence is never admissible to show that he intended to devise a particular thing, and by mistake devised a different thing. This would be to repeal the statute concerning wills. (1 Johns. Ch. Rep. 231. 7 Monroe, 629. 2 A. K. Marsh. 51. *Davis v. Davis*, 8 Mo. Rep. 56. 4 Dessaus. 215. 7 Metcalf, 188. 1 Paige's Ch. Rep. 291. Roberts on Frauds, 15.) Parol evidence is only admissible in the case of a latent ambiguity or a false description. In the first case, it neither takes from nor adds to the words of the will, but points out the person or thing to which those words

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apply. (11 Johns. Rep. 215. 7 Metcalf, 185. 4 Vesey Ch. Rep. 675. 1 Story's Eq. §179. 10 Bacon's Abridg. (Wills, G.) Talbot's Cases, 240. 1 Greenl. Ev. §290. *Carson v. Chew*, 7 Gill & J. 127.) The second case is where the object of the devise has been once sufficiently described without the description which is false. In this case, the false description is rejected, and the will stands, if the description left is sufficiently certain. If not, the will is void for uncertainty. (11 Johns. Rep. 218. Wigram on Wills, 17.) The defendants in their answer ask to show, not a latent ambiguity or a false description, but a *mistake*, which is never allowed. (6 Conn. Rep. 270.)

SCOTT, Judge, delivered the opinion of the court.

1. This is a plain case. The application of the undoubted rules as to the admission of extrinsic evidence in the interpretation of wills, places the matter in a clear light. One of the rules referred to is this : that, for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling it to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. (Wigram on Wills, 51.) The evidence allowable under this rule, and which was offered by the appellants, in connection with the words of the will, shows, beyond all doubt, what property was intended by the testator to be given to his devisees.

It is also a rule that a redundant and superfluous description, which is inapplicable to an object well ascertained by previous or subsequent description, will not prevent the application of parol evidence to show what object was contemplated by the testator. (3 Starkie, 1024.) If the number of the

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township had been omitted by the testator, there would have been no doubt about the land he intended to devise. The inaccuracy or mistake in a description which is superfluous, cannot make a devise void for uncertainty.

There is a distinction between an inaccuracy and an ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous though perfectly accurate. If, for instance, a testator, having a leasehold house in a given place, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would create no ambiguity. If, however, he were to devise an estate to J. B., of D., son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient, merely by the rejection of the words of surplusage, are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. The language may be inaccurate, but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts upon which, from the nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous. (Wigram on Wills, 58.)

Now, with the knowledge of the simple fact that the testator owned no other lands than the home place and the two quarter sections in controversy, can any one doubt what was intended by the words of the will. He devises his estate. The words are, the residue of my estate. He did not intend to give away any thing which did not belong to him; what he designed to give was his own. Can we suppose, against his solemn declaration, that he meant to die intestate as to the greater portion of his estate? But does not the reference to the spring, taken in connection with the fact that there was such a spring on the land he owned, place this matter beyond all dispute?

From the principles which have been stated, it is obvious

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that the testimony offered was admissible, and that testimony, when produced, could leave no doubt that, by his will, the testator passed the land in controversy.

This is no attempt to prove an intention when the words of a will are ambiguous. The result attained is derived from the words of the will itself, merely by enduing ourselves with a knowledge of the circumstances which surrounded the testator in making it.

The other judges concurring, the judgment will be reversed, and the cause remanded.

CAPLES *et al.*, Respondents, *vs.* BRANHAM, Appellant.

1. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note within the meaning of the first section of the act concerning "bonds and notes," (R. C. 1845,) and imports a consideration.
2. It is not necessary that the payees should be designated when the promise is made, if they are designated before suit brought.
3. In declaring upon such an instrument, it is not necessary to set out a consideration in the declaration.
4. One instalment of a note due by instalments may be recovered before the others are due; and under the new practice, it would probably not be material whether the amount is sought to be recovered as a debt or damages.

Appeal from Weston Court of Common Pleas.

Action by Caples and others against Branham on a subscription paper to recover \$100. The paper was in these words:

"January 22d, 1853.

"We, the undersigned, agree to pay the amounts affixed to our respective names, to trustees to be appointed by the educational convention of the Methodist Episcopal church south, for the Weston district, for the purpose of purchasing grounds and building houses suitable for one or more high schools, within the limits of Weston district; the place or places and character of the house or houses to be determined by said convention

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or under their order by trustees or otherwise; one half to be paid on the first day of June, 1853, and the balance on the first day of April, 1854."

This paper was subscribed by the defendant among others, and two hundred dollars written opposite his name.

This suit was brought September 19, 1853, to recover the first instalment of the amount subscribed by the defendant. The petition alleges that the defendant, by the above writing, promised to pay the sum of \$200 "to the trustees to be appointed," &c., setting forth the effect of the instrument, and avers that the plaintiffs are the trustees appointed by the educational convention. No consideration for the promise is alleged, other than is imported in the words of the instrument.

A demurrer was filed and the following causes assigned: 1. That there was a defect of parties — there being no promisees, either natural or civil persons. 2. That the petition stated no consideration for the promise.

The demurrer was overruled, and no answer being filed, a judgment was entered for the plaintiffs, from which the defendant appeals.

A. Leonard, for appellant. 1. The note sued on is not a note within the meaning of our statute, importing a consideration and so valid, *proprio vigore*. There is no payee. It is of the very essence of a contract that there be at least two parties to it, persons capable in law. The statute has not altered this. By the express words of the statute, the payee in contracts embraced by it, must be designated in the instrument. This is as essential to the validity of the paper, *as an instrument*, as that it should be signed by the obligor or express the duty to be performed. An unsigned note, a note omitting the money or property to be paid, and a note omitting to designate the person to whom it is payable, are all equally void as instruments, although they may furnish evidence in support of a contract to pay. (*Cox v. Beltzhoover*, 11 Mo. Rep. 143. *Brown v. Gilman*, 13 Mass. Rep. 160. 1 H. Black. 606-610.) II. No consideration is shown in the petition

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for the alleged promise, and so the promise set up constitutes no legal obligation against the defendant. (*Trustees of Hamilton College v. Stewart*, 1 Comst. Rep. 584. 10 Barb. S. C. R. 312. *Bridgewater Academy v. Gilbert*, 2 Pick. 579. *Limerick Academy v. Davis*, 11 Mass. 114. Smith on Contracts, 163, 201. *Eastwood v. Kenyon*, 39 Eng. C. L. Rep. 143. *Thomas v. Thomas*, 42 Eng. C. L. Rep. 947.)

W. P. Hall and Vories, for respondent. 1. It is not a good cause of demurrer that the payees were to be appointed after the note was executed. (*Bull v. Talcot*, 2 Root, 120. *Thompson v. Page*, 1 Metcalf, 570-71. 2. The instrument sued upon is one which, under our statute, imports a consideration. (R. C. 1845, tit. Bonds and Notes, sec. 1.) It is not necessary that a note, under our statute, should possess all the requisites of promissory notes under the statute of Anne, which are treated as negotiable instruments. (10 Mo. Rep. 675-718. 12 Mo. Rep. 532. 15 Mo. Rep. 602.) 3. The consideration apparent on the face of the instrument is sufficient. It is the appointment of trustees by the Methodist Episcopal convention. That appointment was made. Again, subscription papers for the erection of schools, churches, &c., are upon a sufficient consideration, and will support an action against the subscribers. (*George v. Harris*, 4 N. Hamp. 534. 7 N. H. 435, and cases there cited. *Underhill v. Gibson*, 2 N. H. 352. *Trustees v. Ripley*, 6 Greenl. Rep. 445. 2 Root, 120. 20 J. R. 89. 1 Metcalf, 570-71. 6 Pick. 427. 6 N. H. 164. 2 Denio, 403.)

SCOTT, Judge, delivered the opinion of the court.

1. Bills and negotiable promissory notes, by the common law, imported a consideration. Between the immediate parties to such instruments, the consideration might be enquired into as between the maker and promisee, and the drawer and the acceptor. All other contracts not under seal, whether written or oral, required a consideration. In 1765, Mr. Justice Wilmot was strongly of the opinion, and Lord Mansfield apparently so,

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that a written promise not under seal, carrying with it the evidence of deliberation, required no consideration. Their opinion did not obtain. There is no difference at common law between an oral and a written promise not under seal; they are both classed under the head of simple or parol contracts.

Our legislature, aware that men are not apt to promise to pay money without a sufficient inducement or consideration, and knowing that, in most instances, a consideration exists for promises, has changed the rule of the common law, and, at an early day, made all notes in writing executed and signed by any person or his agent, whereby he shall promise to pay to any other person, or his order, or unto bearer, any sum of money or property therein mentioned, import a consideration. The object of this provision was, to place notes not negotiable on the same footing occupied by negotiable notes, so far as the matter of a consideration was concerned. The writing showed deliberation, and, in the nature of things, there is no reason why the one instrument should not import a consideration as well as the other. We are aware that the credit of negotiable paper is sustained by considerations of commercial policy. The law provided for one class of promissory notes. The statute was designed to provide for all others. The instrument sued on is certainly a note in writing, signed by a party promising to pay money. There is no form prescribed by law to which we must adhere in the making of a promissory note: no formal words are required. If, in sense, it is a promise in writing to pay another money or property, it is a promissory note. A negotiable note, payable to a fictitious person, is a valid instrument, and may be declared on as one payable to bearer.

2. An objection to the instrument sued on being considered as a note within the statute, is, that it is made payable to trustees to be appointed by the educational convention of the Methodist Episcopal church south. Now, when the trustees are appointed, as has been done in this case, the note is one payable to those trustees. A bill drawn by one, payable to his

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own order, is a valid instrument. (Buller, 269.) So, a note payable to the heirs of E. C., by her marriage with W. C., has been held a valid instrument. (11 Mo. Rep. 144.) So, a writing signed by Wm. Muldrow and others, by which they promise to pay to Wm. Muldrow, or order, has been held to be a note within the statute. (7 Mo. Rep. 563.) In this case, it is said, in good sense and sound principle, there is no difference whether the plaintiff was originally named or afterwards designated, according to the terms of the defendant's undertaking; so soon as the order was given, the promise attached and enured to the benefit of the person to whom it was given. The authorities referred to in the last cited case are in point, to show that the objection above named to the validity of the instrument under consideration, cannot be sustained. They are mostly taken from the English books, and, upon reference to the statute of Anne in relation to promissory notes, it will be found similar to our own, and to contain the words, "*to pay to any other person or his order.*" Thus, it will be seen, that the English and American authorities maintain that, although the statute requires a promissory note to be payable to any other person, yet it is no objection that the person is not designated at the time the promise is made, but it will be sufficient that he is ascertained before the institution of the suit.

3. In this state, ever since the statute of 1807, which allowed bonds and notes, when sued on, to be read in evidence, unless their execution was denied under oath, it has been held that promissory notes imported a consideration, and that, in an action on them, it was unnecessary to set out a consideration in the declaration. (*Rector & Conway v. Honore*, 1 Mo. Rep. 204.)

4. Under the former system of pleading, there would be an objection to this action, on the ground that a part of a debt due by instalments, was sought to be recovered as a debt. The money here sued for is claimed as a debt. A debt is not divisible. Strictly, this action, in form, should have been for damages. The objection, however, would probably not be avail-

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able under the present practice act, and this suggestion is made lest it should be thought that the court had impliedly overturned a principle which may have application on occasions not arising in pleading. The other judges concurring, the judgment will be affirmed.

FACKLER, Plaintiff in Error, *vs.* CHAPMAN, Defendant in Error.

1. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages.
2. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another.
3. Possession of stolen goods recently after the larceny is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances.

Error to Cole Circuit Court.

This was an action, under section thirty-five of article nine of the act concerning "crimes and punishments, (R. C. 1845,) brought by Fackler in 1851, to recover the value of certain goods alleged to have been stolen from him by two slaves of the defendant.

The facts, as they appeared in evidence, were about these : Certain goods were stolen from the store of the plaintiff, one night in October, 1850. Defendant was then in California. His two slaves were in the possession of William A. Davison, who had hired them. About two weeks after the larceny, the plaintiff received information which led him to go to the house of Davison to make a search. William C. Young accompanied him. They found a portion of the goods at the house of Davison, in a box under a bed in which the slaves slept. The

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slaves stated where the other goods could be found, and their statement was written down by the plaintiff. Plaintiff handed this statement to his clerk, McDearmon, who afterwards made search and found portions of the goods at the places specified. He found Mr. Palmer's negroes in possession of some of the goods, and Mr. Stanley's of others.

At the trial, the plaintiff examined Young as a witness, and read the deposition of McDearmon, and this was all the evidence in the case.

Young was asked what the defendant's slaves stated as to where the remainder of the goods could be found, but the court excluded his answer, when it appeared that he did not know that the goods actually were found at the places named by the slaves. The written statement of the declarations of the defendant's slaves was not produced at the trial. McDearmon testified to finding portions of the goods at the places named in the statement.

Portions of the deposition of McDearmon, consisting of the statements of Palmer's negroes and of third parties, were excluded.

The plaintiff asked four instructions, the first and second of which were refused, and the third and fourth given.

The first asserted that possession of part of the stolen goods recently after the loss by the defendant's negroes was *prima facie* evidence that they had stolen the whole, unless such possession was otherwise accounted for.

The second asserted that the defendant was liable for all the goods stolen, not to exceed the value of his slaves, if they aided in the larceny, even though the slaves of other parties might also have aided in it.

At the instance of the defendant, the jury were instructed that the defendant was only liable for the goods actually stolen by his negroes and not for any other.

The court, of its own motion, gave an instruction which is substantially the same as the first instruction asked by the plaintiff and refused, with the following qualification: "This

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presumption of guilt from possession, however, ceases as to such articles as were found in the possession of other slaves than the defendant's (recently after the loss,) unless the jury believe from the evidence that such articles were obtained from the slaves of the defendant after they had been stolen."

There was a verdict for plaintiff for the sum of \$26 90, the amount claimed being \$115 65. He sued out this writ of error.

Parsons, for plaintiff in error. 1. The court erred in excluding the testimony of Young as to where the remainder of the stolen property might be found. It was competent to prove such statements by one witness, and prove that they were true by another. This was admissible to show a guilty knowledge on the part of the slaves. (Archbold's Crim. Ev. p. 50-1. *Crowther v. Gibson*, 19 Mo. Rep. 365. *Marr v. Hill & Haynes*, 10 Mo. Rep. 330.) 2. The second instruction asked by plaintiff should have been given. This action is in the nature of trespass, and trespassers are jointly and severally liable for the whole injury. (*Commonwealth v. Millard*, 1 Mass.) 3. The instruction given by the court, at its own instance, is not the law, as applicable to the facts of this case.

Edwards, for defendant in error. 1. Evidence of the statements of the slaves was not admissible against their master, nor was evidence of facts growing out of such statements admissible. It was objectionable as hearsay testimony, and also as negro testimony. 2. The first instruction asked by plaintiff was properly refused. The possession was not recent, and besides, the possession of the slave is not evidence against his master; nor would proof that the defendant's slaves stole a part of the goods render him liable for all of them. (2 Russ. on Crimes, 123-4, and note *ff.*) 3. The second instruction was properly refused. If the slaves of defendant and of others stole the goods together, it is not within the meaning of the statute that the defendant should be liable for the whole of them.

Scott, Judge, delivered the opinion of the court.

This was an action against the defendant in error, under the thirty-fifth section of the ninth article of the act concerning crimes and punishments, to recover damages for property of the plaintiff, alleged to have been stolen by slaves belonging to the defendant.

1. The main question in the case is, whether, if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages resulting from the wrong. Every larceny includes a trespass. In trespass, all are principals, and each trespasser is liable for the entire damages which may flow from the commission of the injury, although many may be concerned in it. There is no contribution among wrong doers. If the slaves themselves could be sued for the wrong done, this principle, no doubt, would be applicable. Can it make any difference that the action is given against their masters? In case the slaves of several persons unite in the commission of a larceny, if the person injured by the offence was driven to his separate action against each master for the share of property taken by his slave, the difficulty in ascertaining, in such cases, the portion taken by each slave, would make the remedy almost nugatory. As the statute has rendered the master liable for the damages resulting from the larceny of his slave, there can be no hardship, in an action against him, in attaching to the act of the slave the legal consequences which flow from it. If three slaves belonging to different masters unite in a theft of property of the value of one hundred dollars, each one of the slaves, in the judgment of the law, has stolen one hundred dollars' worth of property, and not property worth one-third of that sum, or only such portion of it as he has actually taken and carried away.

2. It can scarcely be necessary to state that such portions of the deposition as merely related to what the witness heard from others were inadmissible. The declarations of the slaves, show-

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ing where the stolen property might be found, were evidence, in connection with proof that the property was found at the places mentioned by them. It is not necessary that the declarations of the slaves and the fact that the property was found at the place where it was stated to be, should be proved by the same witness. One witness may testify as to the declarations, and another may prove that the property was found where it was alleged to be. Under this view, there would be no impropriety in admitting the testimony of the witness, Young, if it was shown by another witness that the property was found at the place mentioned by the slaves to him.

The fact that the declarations of the slaves were reduced to writing, is no reason for refusing proof of them, in the absence of such written declarations. It appears that the writing down of the declarations was an extra-judicial act, and altogether voluntary.

We cannot say that the court erred in refusing the plaintiff's first instruction. The fact that the goods stolen were found in the possession of the slaves of the defendant, was a circumstance tending to prove that they were taken by them, the weight of which was a matter proper for the determination of the jury under all the circumstances.

There were words in the instruction given by the court which were scarcely warranted by law. The imputation of theft, arising from the possession of stolen goods, could only arise as to the goods actually in the possession of the thief. If a part of the goods were proved to have been stolen by the slaves, the jury would determine, from the circumstances, whether all the goods lost were not taken at the same time.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

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TAYLOR, Defendant in Error, vs. STEAMBOAT ROBERT CAMPBELL, Plaintiff in Error.

1. Under our act, (R. C. 1845,) a party may proceed against a boat by name, for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip.
2. One partner may sue for the breach of a contract made by him in his own name, although it was made for the benefit of the firm.
3. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might go to the jury upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent.
4. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation.
5. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis.
6. (*Collier v. Swinney*, 16 Mo. Rep. 484, affirmed.)

Error to Cooper Circuit Court.

This was an action against the steamboat Robert Campbell, for the non-performance of a contract of affreightment.

The petition stated that William Edds, master of the boat, on the 12th of December, 1852, agreed, on behalf of the boat, to transport 400 hogs of the plaintiff, from Boonville, on the Missouri river, to St. Louis, at fair rates, and failed to comply with the contract.

The master answered on behalf of the boat, denying that he made the contract set forth in the petition, alleging that the plaintiff did not have 400 hogs ready to be shipped on said boat in pursuance of the supposed contract, and further alleging that, on account of low water and ice, it was impossible for the boat to have complied with the contract, if any such had been made.

At the trial, the telegraph operator at Boonville testified that the plaintiff delivered in his office the following dispatch, which was forwarded to Lexington on the day of its date:

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“Boonville, December 11, 1852.

“To Robert Campbell :

“Make room for 400 hogs at fair rates.

“WM. TAYLOR.”

The operator at Lexington testified that the above dispatch was received at his office on the day of its date, and on the same day “delivered to the officers of the steamboat, Robert Campbell;” and that on the next day, the following dispatch was deposited in his office and forwarded to Boonville :

“Lexington, December 12.

“Will take your hogs. Be down to-morrow morning.

“CAPT. EDDS.”

Upon this testimony, the plaintiff was permitted to read the dispatches in evidence to the jury, notwithstanding an objection by the defendant.

John Taylor testified that he and his brother, the plaintiff, were in partnership; that, on the 11th of December, 1852, they had 370 hogs at Boonville, which they had purchased on joint account, and intended shipping to be sold on joint account as partnership property; that he had refused to join in a suit against the boat, but expected to share the expenses and benefits, if any resulted from the suit.

It was in evidence that the Robert Campbell passed Boonville, on her downward trip, on the 13th of December, 1852, without attempting to land, and that she was the last boat down during that month. There was evidence that, on account of ice in the river, it would have endangered the safety of the boat to have taken 370 hogs on board, and evidence to the contrary. The plaintiff introduced evidence to fix the amount of damage he had sustained by the failure of the boat to take the hogs.

The court left it to the jury to determine whether there was a contract, and directed them that the boat would not be excused for a failure to comply with her contract by the low water or ice.

The following instructions asked for the defendant were refused :

1. If the jury find from the evidence, that the plaintiff did.

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not have 400 hogs ready to be shipped at Boonville as the boat passed down, they must find for the defendant.

2. If the hogs belonged to plaintiff and John Taylor jointly, and they were in partnership in the same, then the jury must find for defendant.

3. There is no evidence that the steamboat Robert Campbell, by and through the master thereof, made the contract set forth in the plaintiff's complaint, and the jury must therefore find for the defendant.

4. If it would have endangered the life of the boat to have taken the hogs at the time she passed down, on account of ice and the stage of water, then the boat was excused from taking the hogs at that time.

The plaintiff obtained a verdict for \$600, and the defendant sued out this writ of error.

W. Adams, for plaintiff in error. I. The telegraphic dispatch signed, "Capt. Edds," was improperly read in evidence, 1, because no proof was given that Edds, the master, signed the same or authorized it to be sent, and 2, because the dispatch itself, or taken in connection with the other testimony, was no evidence of any contract, much less of the contract set forth in the complaint. II. There was no proof whatever of a contract to transport hogs from Boonville to St. Louis. III. There were only 370 hogs at Boonville, and they were partnership property, belonging to plaintiff and his brother jointly. If there was any contract, it was a joint contract, made with the plaintiff and his brother; and 370 hogs would not satisfy a contract for 400, nor could the suit be brought in the name of the plaintiff alone. (New Practice Act.) IV. Even if there had been a contract, as alleged, it was not such a contract as would authorize a suit against *the boat*. The fourth clause of the first section of the act concerning "boats and vessels" only applies to cases where an actual bailment has been made, and not to contracts made by the master or owner to receive and transport goods at a future time. V. The obstruction of navigation by ice is an act of God, which excuses

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the non-performance of a contract of affreightment. VI. The master of a boat, as such, has no power to bind even the owners by a contract for the future reception and transportation of freight; much less can he make a contract of that kind so as to create a lien on the boat under the statute. (Story on Agency, §121. 20 Ohio Rep. 54.)

J. W. Morrow and *J. B. Gardenhire*, for defendant in error. I. John Taylor was not a necessary party. He was no party to the contract, and if he had joined, there would have been a variance between the contract set out and the proof. He was a dormant partner and was properly omitted. (2 Taunt. 326-7. 8 Serg. & Raw. 54. 6 Pick. 352. 3 Maine, 416. 3 Cow. 85.) He would not consent to be made a party, and therefore was properly omitted. (Story's Eq. Pl. §167, note 3. 11 Vesey, 313.) A complete determination of the controversy can, for this reason, be had without him. (New Practice Act, art. 3, secs. 7 and 10. 19 Vesey, 457.) The objection, not being taken by answer, is waived. (New Practice Act, art. 6, sec. 6.) II. There were facts and circumstances in evidence *tending* to prove the making of the contract set out in the petition, and they were properly submitted to the jury. (Cow. & Hill's notes, part 2, p. 1310 and authorities cited.) The transmission of messages by telegraph is a new and great element in the transaction of commercial business. Contracts are made every day for large amounts through its means; and if the strict rules of evidence are to be applied to such contracts, its utility will be greatly diminished. III. As the defendant, by his own contract, assumed the obligation to take the hogs, the act of God will not excuse him for a failure, because he might have made the proper exceptions, if he had chosen. (Story on Contracts, §668. 16 Mo. Rep. 467.)

SCOTT, Judge, delivered the opinion of the court.

This was an action brought by the defendant in error against the steamboat Robert Campbell, for the non-performance of a contract of affreightment.

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1. One of the points made in the cause is, that a proceeding against a boat *in rem* for the non-performance of the contract, the subject matter of this suit, is not within the statute; that the captain of a boat cannot make future contracts for the transportation of freight, and that the only remedy for the breach of such contracts is, an action against the owners of the boat, as the statute was designed to render the boat itself subject to process, only in those cases in which the freight had actually been received on board.

Opinions of judges in other states were cited in support of this view of the subject. But it did not appear that the statutes in those states were entirely similar to our own. Questions of this kind depend, for their solution, on the words of the law, and it is obvious that opinions based on statutes varying from ours, can have but little weight. Our law creates a lien, and gives an action against a boat, for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or of any contract touching the transportation of persons or property. These words are sufficiently comprehensive to embrace a neglect or refusal to comply with a contract of affreightment, or for the transportation of property. The construction contended for would render the word "non-performance" inoperative, as all the cases claimed to be within the statute would be covered by the word, "malfeasance." We will not undertake to determine how far the captain is authorized to make future contracts binding the boat, but it is obviously for the interest of the owners of boats that captains, in their voyages up a stream, should have power to make contracts to take freight on their return. The denial of such a power would operate injuriously to the boats themselves, as, without a contract, many would be unwilling to take their produce to the river for transportation. It is not an easy matter to ascertain who are the owners of a steamboat, and, when the owners are ascertained, they are usually found to reside at places remote from those at which their boat is employed; hence the law for the benefit of those who deal with boats has al-

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lowed an attachment against them for certain enumerated wrongs.

2. The hogs to be transported belonged to the plaintiff and John Taylor in partnership. Now, a contract made by an agent, in his own name, may be sued on by the agent; for it is a general rule that, wherever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made. (*Cothay v. Fennell*, 21 E. C. L. 146.) The property belonging to partners, a contract made respecting it would, in point of law, be a partnership contract, and suit upon it would properly be brought in the names of the firm. But, as this contract was made in the name of one partner, there is no principle of law which prohibits an action on it in the name of him alone by whom it was made. A mere agent, as we have seen, may sue on a contract made in his own name; *a multo fortiori*, the same thing can be done by a partner. If this matter stood as at common law, the foregoing would be the principles, it is conceived, by which the parties would be governed in the institution of a suit on this contract. Now, as the statute has made other parties necessary, as advantage was not taken of that omission in the way and at the time pointed out by law, no exception could be taken at the trial for the want of proper parties. (Practice Act, art. 6, sec. 6.) Nor was there any variance, as the contract proved corresponded with that stated in the petition.

3. The evidence presents a new question, and one of some importance to business men, in relation to the manner in which the execution of a contract, made through the medium of a telegraph, is to be proved. It is not expected, when men contract by telegraph, that they are afterwards to be bound or not, as their passions or interests may dictate. Such contracts must be regarded as binding and obligatory as if made in the ordinary way. Private communications relative to business, made by means of a telegraph, are usually relied on, and that reliance has not proved unfounded. When men consent to use the tel-

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egraph for the purpose of making an agreement, there is no hardship in submitting to a jury, as evidence of their consent to such an agreement, those facts and circumstances which are received by and acted on by mankind, in communicating through that medium. Here, the defence does not turn on any imposition or forgery on the part of the agents of the telegraph; but the plaintiff, by the pleadings, is put to the proof of the contract on which he has sued. The evidence is ample to show that a communication was made by the plaintiff to the defendant; but the difficulty arises in showing that the answer to that communication was from the agent of the defendant. The telegraphic agent testifies that the dispatch received from the plaintiff was delivered to the officers of the steamboat Robert Campbell, and a dispatch in answer to that of the plaintiff was deposited in his office to be forwarded to the plaintiff, which was done on the next day. If, under such circumstances, any person had received a dispatch in answer to one forwarded by him, he would not have failed to act upon it. His conduct would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph. For these reasons, we are inclined to the opinion that the evidence offered by the plaintiff was sufficient to permit the dispatch to be read to the jury, who would then, from all the circumstances, determine whether it was the act of the master of the boat.

4. We do not consider that the principle which makes entire a contract for the delivery of a number of specific articles, and which relieves a vendee from the obligation of receiving a part of them as having any application under the facts of this case. Had the defendant refused to receive a less number of hogs than that stipulated, then the question, whether the number offered was a substantial compliance with the contract, would have arisen. Had less than the stipulated number been refused, other hogs might have been obtained, or the plaintiff might have been willing to have paid freight for the number agreed upon, in order that those on hand might have been transported to market.

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5. Considering the medium through which the contract was made, and the fact that St. Louis is the great mart of this state, and that all boats on the Missouri river make that place their destination, we are of the opinion that the dispatches sufficiently show that a contract of affreightment for four hundred hogs to St. Louis was intended by the parties. Had any other port than St. Louis been contemplated, the contract could not have been sustained. When a boat on the Missouri river agrees to take freight, every one understands the place to which it is to be carried.

6. It may be answered to the objection that the boat was prevented by ice from complying with her contract, that this case falls within the principle of that of *Collier v. Swinney*, (16 Mo. Rep. 484.)

Judge Ryland concurring, judgment affirmed.

OLIVER, Plaintiff in Error, vs. OLIVER, Defendant in Error.

1. Bill for a divorce. It appeared from the record that, after a decree *nisi*, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed.

Error to Callaway Circuit Court.

Jones, for plaintiff in error.

SCOTT, Judge. This was a suit begun by the plaintiff in error against his wife, the defendant in error, for a divorce. There was a decree *nisi* taken against the wife. Then the following entry appears of record: "Afterwards, the plaintiff appears and being heard, it is considered and adjudged by the court that his petition be dismissed."

It appears from this entry that the cause was heard by the court on the merits, and that it did not go off on a demurrer. There being nothing preserved by a bill of exceptions, none of the evidence taken being shown, the judgment must be affirmed. Judge Ryland concurring.

Javens v. Harris.—Whyte v. Bennett's Adm'r.

JAVENS, Defendant in Error, *vs.* HARRIS, Plaintiff in Error.

1. A finding must contain a statement of facts *proved*, not a detail of evidence.

Error to Jackson Circuit Court.

J. B. Hovey, for plaintiff in error.

Sheley, for defendant in error.

SCOTT, Judge. This cause was tried by the court, and, in a matter of importance, the judge, in his finding, stated the evidence in relation to a fact, instead of stating how the fact really was. The finding of the court, when the cause is submitted to it, must contain the facts as proved by the evidence, and not a mere statement of the evidence itself. If the court is at a loss as to how a fact should be found from the evidence, it should not be sent here, but the submission to the court should be set aside, and the cause tried by a jury.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded.



WHYTE, Plaintiff in Error, *vs.* BENNETT'S ADMINISTRATOR,
 • Defendant in Error.

1. No facts found.

Error to Callaway Circuit Court.

This suit originated in the county court and was taken by appeal to the Circuit Court.

J. F. Jones, for plaintiff in error.

Ansell, for defendant in error.

SCOTT, Judge. This cause was tried by the court without a jury, and as no facts were found, as required by law in such cases, the judgment will be reversed, and the cause remanded. Judge Ryland concurring.

Elliott v. Pogue.—Ruble v. Thomasson.

ELLIOTT, Respondent, *vs.* POGUE, Appellant.

I. Judgment affirmed for want of bill of exceptions, the cause having originated before a justice.

Appeal from Newton Circuit Court.

F. P. Wright, for appellant.

John M. Richardson, for respondent.

SCOTT, Judge. This was an action originally tried in a justice's court, and was transferred, by appeal, to the Circuit Court. There was a trial on the merits in that court, but as no bill of exceptions was preserved, there is nothing in the record which will warrant us in disturbing the judgment below. Judge Ryland concurring, judgment affirmed.

RUBLE, Respondent, *vs.* THOMASSON & ABERNATHY, Appellants.

1. Bill of exceptions stricken out, because not filed at the term at which the trial took place, no reason for the delay appearing on the record.

Appeal from Barry Circuit Court.

Action commenced before a justice, and appealed to the Circuit Court, where there was a judgment for the plaintiff at the November term, 1853. The defendant appeared before the clerk in vacation and prayed an appeal, which was granted. At the succeeding May term, by leave of court, he filed his motion for a new trial, which being overruled, he filed his bill of exceptions. At the foot of the bill of exceptions, was what purported to be an agreement by the plaintiff's attorney, that it might be filed *nunc pro tunc*, but there was no entry upon the record in relation to the matter.

F. P. Wright & Price, for appellants.

No appearance for respondent.

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SCOTT, Judge. No reason appearing in the record why the bill of exceptions filed in this case was not made up until the term subsequent to the trial of the cause, it must be stricken out and the judgment affirmed; Judge Ryland concurring.

READY, Respondent, *vs.* STEAMBOAT HIGHLAND MARY, Appellant.

1. Upon the question of negligence of a boat, evidence of the statements of the pilot is not admissible.

Appeal from Jackson Circuit Court.

This was an action against a boat under the statute to recover the value of a horse alleged to have been lost by reason of the negligence of the officers and crew of said boat. The facts appear in the opinion of the court when the cause was formerly here. (17 Mo. Rep. 461.) The case now comes here after a trial by jury. At the trial, the deposition of Sublett, who was a passenger on the boat upon the trip when the horse was lost, was read on behalf of the plaintiff. The defendant objected to a portion of this deposition, which is set out in the opinion of the court, but the objection was overruled. After a verdict and judgment for plaintiff, the defendant appealed.

J. B. Hovey, for appellant, among other points relied upon for a reversal of the judgment, insisted that the court erred in admitting the evidence of Sublett as to what Holland told him.

There was no appearance for respondent.

RYLAND, Judge, delivered the opinion of the court.

From the record in this case, it becomes necessary for this court to consider the rulings of the court below in regard to admitting evidence for the plaintiff, and in giving instructions to the jury.

This case was before this court at a previous term, and was reversed. (See 17 vol. Mo. Rep. 461.) The general prin-

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ciples involved in the case were settled in the opinion there given and reported. We shall now only observe the instructions and the evidence of the witness, Sublett.

1. In regard to the instructions, this court cannot find any serious objection to those given, nor do we see error in refusing the one not given. Upon this ground, then, we would not disturb the judgment; but this court is, with reluctance, compelled to send the case back, for the act of the court below, in admitting that part of Sublett's deposition, in which he details a conversation between himself and Mr. Holland, a pilot on the boat.

The witness, in his deposition, states: "On the night that said horse was lost, witness sat up until 11 o'clock, knowing that the mouth of Little Blue was a dangerous place on the river. *Mr. Holland told witness that he would not pass that place that night.* Mr. Holland was one of the pilots of said boat. With this assurance, witness went to bed and knew nothing of the accident until morning."

The defendant objected to that part of the deposition detailing what Holland told witness. It was but secondary evidence—hearsay, at best, and Mr. Holland might have been produced and examined, or his deposition taken, showing why he was unwilling to pass that part of the river at night.

We cannot say what effect this improper evidence had on the minds of the jury; it was calculated to make the impression that a pilot thought it wrong to pass by the mouth of Little Blue in the night; and that it was, therefore, some evidence of negligence or want of care in the officers of the boat in thus passing. No matter what impression was made, it is not for this court to say that no harm was done to the defendant by this evidence. There may have been none, or it may have been an inducement to make the jury find for the plaintiff. At all events, it was not proper evidence; it should have been rejected; it was error to admit it. The judgment below is reversed, and the cause remanded; Judge Scott concurring.

Northcutt v. Northcutt.

NORTHCUTT, Respondent, *vs.* NORTHCUTT *et al.*, Appellants.

1. If a testator's name is signed to a will by another at his request, and he then makes his mark, this is not a sufficient signing by the testator himself, but the will must be attested as required by the fifth section of the act concerning "wills," (R. C. 1845.)

Appeal from Boone Circuit Court.

This was a proceeding to vacate the will of William Northcutt, previously established in the Boone county court. The will was executed in 1846, before the repeal of the fifth section of the act concerning "wills," (R. C. 1845.)

Upon a jury trial of the question whether the instrument was the will of the deceased, the proof was, that one of the subscribing witnesses signed the testator's name at his request, and that thereupon, the testator made his mark in the usual manner, by putting a cross between his christian and surname; but there was no statement upon the will that the witness signed the testator's name at his request, pursuant to the fifth section of the statute of wills of 1845. The court ruled that the instrument, on account of this omission, was not well executed, and under this direction, the jury found against the will.

Gordon & Guitar, for appellants. 1. Under our statute of wills before the revision of 1845, a mark was a sufficient signing. In adopting the British statute, we adopted the construction put upon it in British courts. (3 Levens, 1. 8 Ves. 185. 8 Ves. 504. 8 Adol. & Ellis, 94. 5 J. R. 144. 10 Paige's Ch. Rep. 88. 16 Barb. S. C. Rep. 145. 13 Iredell, 259. 2 Greenl. Ev. §674.) 2. There have always been two modes of executing a will provided by the statutes of wills—a signing by the testator himself, and a signing by some other person by his direction and in his presence. The new provision, contained in the fifth section of the act of 1845, provides additional formalities where the second mode of signing is adopted, and, under the decision of this court, (14 Mo. Rep. 611,) it is essential to a valid execution of the will under this

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second mode, that those additional formalities should be observed ; but neither this decision nor the statute under which it was made touches the present case, where there is a good execution of the will by the testator's own signing with a mark.

S. A. Young and Boyle Gordon, for respondent. A mark is not a sufficient signing under the fourth section of our statute. The legislature undoubtedly used the word *signed* in the sense of writing the name. They intended that the handwriting should afford some evidence of the identity of the signature. To provide for cases where the testator was not able to write, they allowed his name to be signed by another ; but require the person who writes the name to attest the fact in the manner pointed out by the fifth section. That the word "signed" is used in this sense in the fourth section, is evident from the fact that it is thus used in the fifth section — "every person who shall *sign the testator's name*," &c. Different sections in a statute must be taken together in construing it. Although the fourth section of our act is a transcript of the British statute, it does not follow that it is to have the British construction when incorporated into an act, other provisions of which show that such was not the design of the legislature. But the late decisions show that a mark is not a sufficient signing, even within the British statute. (1 Phill. on Ev. (3d Am. ed. p. 436, and authorities cited in a note.) 2 Vesey, sr., 459.) If, however, a mark is a sufficient signing within the fourth section, the testator must intend to authenticate his will by this means alone. In this case, the evidence shows that he requested his name to be written. If this was intended by the testator as a part of the act to authenticate the instrument, it was necessary that the directions of the fifth section should be followed. The case of *McGee v. Porter*, (14 Mo. Rep.) is relied on as in point.

SCOTT, Judge, delivered the opinion of the court.

1. The cases which have fallen under our notice, in which it has been held that the making of a mark was a sufficient signing

under the statute of wills, (29 Chas. II.) of which ours is a copy in this respect, are those in which the will was authenticated by the mark of the testator alone without his name. (5 John. 144.) In the matter of *Field*, (7 Eng. Ecclesiastic Rep. 576.) In the matter of *Bryce*, id. 128. *Baker v. Denning*, 35 E. C. L. Rep. 335.) Admitting that the making of a cross is a sufficient signing within the statute, yet it should appear that the testator relied on that act alone as the means of authentication. If to the cross he has superadded his name, or required it to be done, it would appear that he did not rely on the cross for the authentication of his will. If the testator's name is signed to his will by another, at his request, it is difficult to perceive why the will should not then be attested, as is required by the fifth section of the act concerning wills. We know that the mark alone is not often used as a means of authenticating instruments. It is almost invariably used in connection with the written name of the marksman. Its object is, to show that the name written is not subscribed by the person making the mark, but by some other person for him. We do not recollect an instance among us in which a mark alone was used as a signature without the name of the marksman.

The words of the act are, that every person who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request. Here, the testator's name is subscribed to his will by another, at his request. How, then, can we say that he designed authenticating his will by the mark afterwards made? If the making of a mark, when there is a signature of the name, should be deemed a sufficient authentication of a will, nothing would be easier than to avoid the requisition of the statute, in every case of a signature of the name of the testator by the direction of another. It would only be necessary to make a cross, a thing easy to be done and difficult to be detected, and the provision of the statute would be defeated.

This case is within the very words of the statute, and there is

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nothing showing that it is not also within the reason of it, and, as the person who subscribed the testator's name, did not state in his attestation of the will, that he subscribed the testator's name at his request, the will is void.

Judge Ryland concurring, the judgment will be affirmed.

SCHNEIDER, Plaintiff in Error, *vs.* STAIHR & WIFE, Defendants in Error.

1. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband.
2. Where a minor *feme covert* joins in a mortgage of her real estate, she may plead infancy *during minority* in a suit to foreclose.
3. The husband's estate during the marriage may, however, be subjected to sale.
4. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds.

Error to Cole Circuit Court.

Petition by Schneider to foreclose a mortgage executed by Staihr and wife, in 1851, upon the wife's undivided interest in the real estate of her deceased father, to secure a note of the wife's brother, upon which her husband was security. After the execution of the mortgage, the real estate was sold by the sheriff in partition by order of court. The sale was upon credit, and the purchase money had not yet become due. The sheriff was made a co-defendant, and the plaintiff prayed for an order upon him to pay over out of the wife's share of the proceeds enough to satisfy the mortgage debt.

The defendants answered, admitting the execution of the mortgage, but insisting that, as the wife acquired the property by descent, it could not be subjected to the payment of her hus-

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band's debts, and further alleging that, at the date of the execution of the mortgage, the wife was a minor.

At the trial, there was evidence that the wife was a minor when the mortgage was executed, and that she had not yet become of age. The court directed the jury to find for the defendants, if they believed the wife was a minor when she executed the mortgage, and now disavowed the act, and refused contrary instructions asked by plaintiff. An instruction that the plaintiff was entitled to a general judgment against Staihr, for the amount of the note secured by the mortgage, was also refused. The plaintiff then submitted to a nonsuit, and after an unsuccessful motion to set the same aside, brings the case to this court by writ of error.

Parsons, for plaintiff in error. 1. In the eye of the law, Mrs. Staihr is not a minor. After her marriage, the law treats her as an adult. 2. Even if the fee simple title could not be sold on a foreclosure of the mortgage, still the husband's tenancy could be sold to satisfy the debt, and in this view, the plaintiff was entitled to recover against him. He was duly summoned and appeared to the action. If his interest in the mortgaged property was not sufficient to satisfy the debt, the plaintiff was entitled to have the residue levied of his other property. (R. C. 1845, tit. Mortgages, p. 571, §12.) 3. The act of 1849 does not apply to this case. 4. Mrs. Staihr cannot disavow the execution of the mortgage until she becomes of age. (9 Cowen, 626. 17 Wend. 119.)

E. L. Edwards, for defendant in error. 1. The property conveyed by this mortgage, having descended to Mrs. Staihr after the debt secured thereby was contracted, cannot be held liable for such debt. 2. Property descending to a married woman cannot be made liable for a debt contracted by her husband as the security of another, under any circumstances. (Sess. Acts of 1849, p. 67.) 3. Mrs. Staihr being a minor when she executed the mortgage, is not bound by the same after disavowal. (*Youse v. Morcum*, 12 Mo. Rep.)

SCOTT, Judge, delivered the opinion of the court.

1. It cannot be maintained that the act of the 5th March, 1849, exempting the property of married women from the debts of their husbands, was designed to prevent *femes covert* from disposing of their real property by a voluntary conveyance, for whatever purpose they thought proper. If married women, clothing their deeds with the solemnities required by law to make them effectual, will convey away their estates, the law does not interpose to prevent them. Without their consent signified in the manner prescribed by law, their property cannot be taken by execution to satisfy their husband's debts. But if they will voluntarily give it away, they cannot be prevented. The husband and wife may unite in a sale of the wife's land, and apply the money thus obtained in payment of the husband's debts. If this can be done, what is to prevent her from joining in a mortgage with her husband, and thereby subject her land to the satisfaction of his liabilities?

2. The wife being a minor at the time of the execution of the mortgage, her infancy may be set up in avoidance of the deed. As to the time of avoiding contracts made by infants, the weight of authority seems to be that, in cases of sales of land, infants cannot conclusively avoid the conveyance until they are of age. (Amer. Leading Cases, 1 vol. 114.) As in this instance, the effect of the omission of the wife to plead her infancy, would be to subject her estate to be sold under execution, by which an innocent purchaser might be injured, and as this proceeding is in the nature of an action to subject her estate to the payment of a debt, from analogy to the course in a suit on a contract by which an infant is jointly bound with others, we see no impropriety in permitting her to set up her infancy, though under age, in avoidance of this claim against her. In coming to this conclusion, we do not wish to be understood as expressing any opinion as to the consequence of an omission to plead, during her minority, her infancy in actions like the present.

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4. As the husband, by virtue of his marriage, was vested with an estate during its continuance in his wife's real property, the court should have proceeded in the suit and condemned that interest to sale. Moreover, as there was personal service of the writ, the plaintiff was entitled to a general judgment, and therefore, though the mortgaged property failed to satisfy it, he would have been entitled to execution against any other property belonging to the mortgagor.

4. We do not see the propriety of making the sheriff a party to this suit, who was charged with the duty of making sale of the mortgaged premises in another suit for partition. The object of this step, it seems, was to subject the money arising from the sale in partition to the satisfaction of the judgment in this cause, or at least such portion of it as the defendants would be entitled to. Such a course would lead to inextricable confusion, and there is no warrant in law for it. The plaintiff in this suit will sell such interest as the mortgagor had in the mortgaged premises, and the purchaser, after he has obtained his deed, will assert his rights against those claiming under the sale in partition, as they would take subject to the mortgage, it having been recorded prior to those proceedings. Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

WOODSON, Respondent, vs. SCOTT, Appellant.

1. The supreme court will not reverse a judgment for excessive damages unless in a very clear case.

Appeal from Pettis Circuit Court.

W. Adams, for appellant.

P. R. Hayden and *J. W. Morrow*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

1. This is an action of slander. The jury found for the plaintiff, and assessed his damages at five hundred dollars.

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The only point presented for our consideration is the amount of damages. The defendant alleges the damages to be excessive.

The record shows the words to have been spoken in an angry quarrel between plaintiff and defendant, when each one was using slanderous and abusive words to and about the other.

In all such cases, the juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority and right to assess the consequent amount of damages therefor.

Whenever the courts below, who hear the cases, shall decline to interfere, by directing new trials, this court will feel itself warranted, in most cases, to let their judgments alone. We cannot say that the damages here are excessive, and unless we are satisfied that such is the case, we ought not to reverse. The judgment below is affirmed; Judge Scott concurring.

OVERTON & WIFE, Respondents, vs. DAVY'S EXECUTOR, Appellant.

1. A will contained this clause: "I wish all my money placed out on interest, on undoubted security, so that the interest may support my children not of age, until they become of age or marry." *Held*, upon the marriage of one of the daughters, she became immediately entitled to her distributive share, although other children were not of age or married.

Appeal from Jackson Circuit Court.

This was a proceeding, originating by petition in the county court for an order upon the executor of Cornelius Davy, to pay over to Overton and wife, the petitioners, the wife's distributive share of certain moneys in the hands of said executor. The order was made, and the executor appealed to the Circuit Court.

The following facts were agreed upon: Davy died in 1852, leaving a last will. The clause upon which this controversy

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turns is contained in the opinion of the court. He left five children, one of whom, Elizabeth, after his death, married Overton, the petitioner, and three of whom were still minors and unmarried. Overton and wife have a child living. More than one year of the administration on Davy's estate had elapsed when this proceeding was commenced, all the debts of the testator and specific legacies had been paid, and there remained in the hands of the executor the sum of \$29,675.

The Circuit Court affirmed the judgment of the county court, and the executor appealed to this court.

Smart & Sheley, for appellant, contended that the money could not be distributed until the youngest child became of age or married.

J. B. Hovey, for respondent, insisted that Elizabeth became entitled to her share immediately upon her marriage.

RYLAND, Judge, delivered the opinion of the court.

The proper construction of the will of Cornelius Davy, deceased, is the only point in this case for the consideration of this court.

The clause in the will about which the present controversy arose, is as follows: "I wish all my money placed out on interest, on undoubted, unquestionable security, so that the interest may support my children not of age, until they become of age or marry; though my son, Allen, is of age, I wish his portion to be withheld until his habits be reformed, of which change my administrators will be the proper judges."

The petitioners, Overton and his wife, who is a daughter of Davy, were married on the 21st of April, 1852, after the death of said Davy. They assert that Elizabeth's interest became vested, under her father's will, at her marriage with Overton; and that they are entitled now to a distributive share of said money. The defendant, Waldo, as executor, denies this, and claims the right to hold the money at interest until the youngest child becomes of age or marries.

The county court ordered the executor to pay to the petition-

ers their distributive share of the money, being one-fifth part of about \$30,000, all the debts and special legacies having been already paid off. The Circuit Court, in effect, affirmed the decision of the county court. The executor, not satisfied with these judgments, appeals to this court.

1. That the plaintiffs are entitled to their distributive share cannot admit of a moment's doubt. Why should the courts be called on to reject the words, "or marry," in the above clause? Why not reject also the first clause of the limitation, "until they become of age?" There is as much ground for the one as for the other. A plain man of common understanding cannot miss the meaning of this sentence in this will.

The testator designed to keep his money out on interest, on good security, and designed to rear and support his children with the interest arising thereon, until they should become of age or marry, respectively.

It would be a strange construction to say that this means until his youngest child should become of age, or until his youngest child should marry. Whichever event should happen first to any of his children, except Allen, the becoming of age or the marriage, then such child should be entitled to his or her distributive share. In *Wells et al., v. Wells et al.*, (10 Mo. Rep. 193,) this court held, where a testator devised property to certain legatees, with a condition that, if "either of such legatees should die before coming of age, or marriage, the portion of such legatee should be equally divided among the others," that such limitation only extended to that contingency which may first happen; and where one married, and then died before coming of age, the limitation, as to that estate, would not apply. The court, in that case, said, there were two events, either of which would free the estates of the children by the last marriage from any contingency, namely, the dying under age, or marrying. "I know not, said Judge Scott, "on what principle the limitation on a child's estate would be continued after marriage under age, until his majority. Such a construction would, in the event of a child's dying

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under age, leaving children, exclude them from the inheritance, which, surely, could never have been intended. The clear implication from the will is, that by attaining a majority or marrying, the estate of a child was freed from any limitation, and became absolute." Apply the principles of this case to the one before us, and there cannot be a doubt as to the propriety of the judgment of the court below. The judgment below is affirmed; Judge Scott concurring.

AIKEN, Plaintiff in Error, vs. TODD, Defendant in Error.

1. Trial by court of an appeal from a justice, and no question of law saved. Judgment affirmed.

Error to Jackson Circuit Court.

Napton, for plaintiff in error.

J. W. Reid, for defendant in error.

RYLAND, Judge. This case was commenced before a justice of the peace, taken afterwards to the Circuit Court, and in the Circuit Court it was submitted to the court for trial, without a jury. The court found for the defendant. A new trial was moved for and overruled, and the case brought here by writ of error.

From the record, it appears that the court was not called upon to declare the law on any point in the case, by either party. No objection raised to any evidence—no declaration as to the law asked of the court. Upon the evidence, the court found for the defendant, and nothing appears upon the record which would warrant the interference of this court. (See *Sickles et al., v. Patterson*, 18 Mo. Rep. 479. *Haase v. Stevens*, id. 476. *Soutier v. Kellerman*, id. 509.)

The judgment is affirmed; Judge Scott concurring.

Tally v. Thompson.

TALLY & WIFE, Defendants in Error, vs. THOMPSON, Plaintiff
in Error.

1. *Cunningham v. Gray*, ante, 170, affirmed.

Error to Jackson Circuit Court.

Petition by Tally and wife to enjoin the sale under an execution against Tally, of a slave, given to Tally's wife upon her marriage. The marriage took place in 1838. The debt upon which the judgment was rendered was contracted before the marriage. The judgment was rendered in 1843. The execution issued in 1853. The plaintiff was dead when the execution issued. These facts appear in the petition. A demurrer was filed and overruled.

Napton, for plaintiff in error. The act of 1849 was only intended to operate upon such debts and liabilities as accrued after the passage of the act. Where a statute admits of a construction which will obviously steer clear of all constitutional objections, our courts have uniformly adopted such construction. To give the law in question here a retrospective operation would be to bring it in direct conflict with the state and federal constitution. (10 Mo. Rep. 517.)

J. B. Hovey, for defendant in error. 1. The petition was good without the facts demurred to. The death of the plaintiff in the execution was a good ground for an injunction. 2. The statute of 1849 is constitutional—the same not affecting the obligation of contracts, but altering the remedy for enforcing them. (4 Wheat. 122. 1 McLean, 35. 4 Watts & Serg. 220. 1 How. (U. S.) 315.)

RYLAND, Judge. The question in this case is, whether the act of 5th March, 1849, concerning married women, and entitled "An act to amend an act entitled 'An act to regulate executions,'" exempting certain property of the wife from certain debts of the husband, is designed to operate upon the debts

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and liabilities of the husband existing before the passage of the act, or only on such as accrued after the passage of the act.

This very question was settled by this court at the last term at St. Louis, in the case of *Cunningham v. Gray*.

It was held that the act had no effect on debts and liabilities existing at its passage; it could only operate on such as accrue after the passage of the same. The judgment of the court below is therefore reversed, and this case is remanded; Judge Scott concurring.

ASBURY, Defendant in Error, vs. MCINTOSH, Plaintiff in Error.

1. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law. (R. C. 1845.)

Error to Jackson Circuit Court.

This was a demand against the firm of J. W. & J. E. McIntosh, presented for allowance in the county court against the administrator of J. E. McIntosh, deceased, having in charge the effects of said firm. The entry upon the record states that J. W. McIntosh, the surviving partner, (who was not the administrator,) appeared in court by his attorney and defended the demand, and the court found "that the late firm of J. W. & J. E. McIntosh is indebted to plaintiff in the sum of \$725, which said sum is by the court here allowed against the firm, to be paid out of the partnership assets," &c.

The surviving partner appealed to the Circuit Court, where his appeal was dismissed, and he brings the case here by writ of error.

J. W. Reid, for plaintiff in error. 1. This was a proceeding under color of the administration law, and under an erroneous practice that has grown up in some of our county courts

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of presenting demands for allowance, in form against the administrator of a deceased partner, but in fact against the partnership effects of the deceased and survivors. Now if the county courts have jurisdiction of such demands (which they have not by any provision of the administration law) then all parties interested have a right to come in and be made defendants; for it is against a fundamental principle of law that the surviving partner should be concluded by a judgment against which he has had no opportunity to defend.

W. Adams, for defendant in error. A writ of error will not lie, at the suit of a surviving partner, upon a judgment against the administrator of the deceased partner. (R. C. 1845, tit. "Administration," art. 1, secs. 53 and 54. Art. 2, sec. 22. Art. 8, sec. 3.)

RYLAND, Judge, delivered the opinion of the court.

1. From the statement in this case, it will appear at once that the judgment of the Circuit Court, in dismissing the appeal taken by the present plaintiff in error from the judgment of the county court, presents the only matter for our consideration.

Asbury having a demand against the firm of J. W. & J. E. McIntosh, presented it for allowance against the administrator of the estate of J. E. McIntosh, deceased. The administrator had charge of the effects of the firm of J. W. & J. E. McIntosh, under the provisions of our statute concerning administration.

This statute requires the executor or administrator of the estate of a deceased member of a partnership to include in the inventory which he is required by law to return to the county court, the whole partnership estate, goods and chattels, rights and credits appraised at its value, as in other cases. The property thus appraised shall remain with or be delivered over, as the case may be, to the surviving partner, who may be disposed to undertake the management thereof, agreeably to the conditions of a bond which is required by law.

In case the surviving partner, having been duly cited for that

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purpose, shall neglect or refuse to give the bond required, the executor or administrator on the estate of such deceased partner, shall give additional bond, and forthwith take the whole partnership estate, goods and chattels, rights and credits, into his possession, and shall be authorized to use the name of the survivor in collecting the debts due the late firm, if necessary; and shall, with the partnership property, pay the debts due from the late firm, with as much expedition as possible, and return or pay to the surviving partner his proportion of the excess, if there be any.

Under the provisions of this law concerning administration of estates, the administrator of the deceased member of the firm of J. W. & J. E. McIntosh, had the management and control of the effects of the firm: he could collect debts due the firm, and pay debts due by the firm.

This being a demand against the effects of the firm, which was allowed in the proper court having jurisdiction over the matter, no other person is allowed to interfere and make himself a party to this proceeding. The administrator, under proper bonds, conditioned as the law requires, is the one party, and the claimant the other. The surviving partner is not permitted to take part in the proceedings, as a party. He cannot appeal by swearing that he believes that he is aggrieved by the decision of the court.

In this case, the administrator, whose second bond is conditioned that he will faithfully execute that trust, and with no unnecessary waste or expense, may not feel at liberty to waste the estate in useless litigation, and consequently will not be willing to appeal, being satisfied with the judgment of the county court. Then no one else for him is permitted to appeal, nor is any one else permitted to sue out his writ of error. From the whole record in this case, we are satisfied that the Circuit Court acted legally in dismissing the appeal. Its judgment is therefore affirmed; Judge Scott concurring.

Anthony v. Rogers.

ANTHONY, Defendant in Error vs. ROGERS, Plaintiff in Error.

1. A mortgagee in possession is liable to account for all rents and profits received by him from the premises.

Error to Buchanan Circuit Court.

This was a bill in chancery filed by Anthony to obtain the title to a lot in St. Joseph. The facts appear in the opinion of Judge Gamble when the cause was formerly in this court. (17 Mo. Rep. 394.) After the cause was remanded, it was referred to a commissioner to take an account. It appeared in evidence before the commissioner that Rogers and McCauly, in an ejectment suit against Hill and Welding, tenants of the lot, had recovered sixty-six dollars for the rents; also that after they recovered possession, they caused a frame tenement to be erected on the lot, from which they received rents. Witness testified that this tenement was built in a cheap manner, and they did not regard it as a permanent improvement, but only intended to answer a temporary purpose. The commissioner charged the plaintiff with the cost of the tenement, and charged the defendants with the rents received from it, and also with the sixty-six dollars recovered in the ejectment suit. The defendants excepted to the report, but it was confirmed.

Loan, for plaintiff in error. 1. The plaintiff was not entitled to the benefit of the sixty-six dollars recovered by the defendants in an ejectment suit to which both he and Kennedy, his vendor, were strangers—recovered too, before plaintiff acquired any title. 2. The rule laid down by this court when the case was formerly here, does not require defendants to account for rents accruing from *temporary* improvements erected on the premises by themselves. (17 Mo. Rep. 394. 3 Littell's Rep. 414.)

Gardenhire, for defendant in error. 1. The amount recovered by defendants in the ejectment suit against Hill & Welding was "income received by defendants from the property since they came into possession of it." (17 Mo. Rep.

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398.) 2. As the plaintiff was charged with the whole cost of the improvements, the defendants could not object that they were charged with the rents.

RYLAND, Judge, delivered the opinion of the court.

We consider the item of sixty-six dollars, which the commissioner reported as a charge against Rogers and others, fully within the principles declared by this court in its opinion heretofore given. (See 17 Mo. Rep. 398.) The judgment of the court must, therefore, be affirmed, as this item of sixty-six dollars is the only one about which any question arises ; Judge Scott concurring.

MATTHEWS *et al.*, Appellants, *vs.* ROUNTREE'S ADMINISTRATOR, Respondent.

1. The supreme court will not reverse a case because the plaintiff did not swear anew to his petition after an amendment in the caption.
2. The supreme court will not reverse because the inferior court refused time to answer after the overruling of a motion to dismiss for frivolous reasons.

Appeal from Polk Circuit Court.

F. P. Wright, for appellants. 1. The court had no right to render judgment upon the amended petition until it was verified by affidavit. 2. The court erred in refusing to give defendant time to plead after the amendment.

No appearance for respondent.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff began his action in the Circuit Court of Polk county, thus : " Thomas Rountree, administrator of the estate of Charles Rountree, deceased, against William R. Matthews and Isaac P. Russell. In the Polk Circuit Court, April term, 1854."

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"Plaintiff states that defendants, by their promissory note, promised," &c., making a good statutory petition, and asking judgment for the amount of the debt and interest. The defendants appear and file their motion to dismiss the action, because the petition does not specify the county in which the action is brought, and because the petition does not specify who is plaintiff nor who is defendant. The plaintiff asked leave to amend his petition, by adding the word "plaintiff" in the caption, after the word "deceased," and the word "defendants" after the name of "Russell;" and also after the words, "In the Polk Circuit Court," the words "County of Polk, state of Missouri." The court sustained the plaintiff's motion, granted leave to amend, and the amendments were made by the addition of the proposed words to the original petition, and overruled the defendants' motion to dismiss.

The plaintiff did not swear to his amended petition. Matthews, the defendant, objected to these rulings of the court, and excepted. The defendants failed to answer; they asked for a continuance until next term; it was denied them; they asked for leave to answer in ten days; it was denied them; thereupon, they failed to answer. The court asked the counsel of defendants if they had a valid defence. The counsel refused to answer. The court then gave judgment for the plaintiff for want of an answer. The defendants moved in arrest of judgment, and filed eight reasons, none of which deserve to be noticed. This motion was overruled, excepted to, and defendants bring the case here by appeal. There is nothing in this record deserving the consideration of this court. The whole of the defendants' objections, and their reasons for dismissing the action, are of the most trivial kind—mere quibbles, which should never be tolerated in a court of justice. Let the judgment be affirmed; Judge Scott concurring.

Byars v. Doores' Adm'r.

BYARS, Defendant in Error, *vs.* DOORES' ADMINISTRATOR,
Plaintiff in Error.

1. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable in an action upon the note upon proof of his want of authority.

Error to Jackson Circuit Court.

This was a demand exhibited for allowance in the county court against the estate of Walker Doores, founded upon the following note :

"One day after date, I promise to pay Edmund Byars four hundred and six dollars for Elias Fisher, French Doores and H. H. Southworth, being money advanced by said Byars in a suit for the above named. "WALKER DOORES, Attorney for Elias Fisher, French Doores, and Hunter H. Southworth."

At the trial in the Circuit Court, this note was read in evidence, although objected to. The plaintiff then offered evidence tending to show that Walker Doores had no authority from Fisher, French Doores, or Southworth, to execute said note as attorney or agent. An exception was taken to the admission of this testimony. There was a judgment for the plaintiff.

Napton, for plaintiff in error. 1. The note sued on is not the note of Walker Doores. It is and purports to be the note of Elias Fisher, French Doores and H. H. Southworth. (Combe's case, 9 Co. 77 a. *Wilkes v. Bush*, 2 East, 141. *Spikle v. Lavender*, 2 B. & B. 452. *Long v. Colburn*, 11 Mass. Rep. 97. 12 Mass. 237. *Ballou v. Talbot*, 16 Mass. 460.) 2. If the note was signed by Walker Doores, without authority, his administrator is responsible for damages in an action on the case, but not in an action on the note. (11 Mass. 97. 16 Mass. 460.)

W. Adams and *E. R. Hayden*, for defendant in error. 1. The defendant's intestate was the *maker* of the note sued upon.

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It was a contract by him on his own account to pay the sum specified for Fisher, French Doores and Southworth. (2 Kent's Comm. 631. *White v. Skinner*, 13 Johns. Rep. 307.) 2. Even if the note had been given by the intestate as an attorney, yet, having no authority to act as such, he would be personally liable. (12 N. H. Rep. 191. 9 N. H. 58 and 59. 3 Johns. Cases, 70, 71. 1 Am. Lead. Cases, 458.)

SCOTT, Judge, delivered the opinion of the court.

1. It must be confessed that the question involved in this case has received different determinations by the courts in the United States. But the weight of authority is decidedly in favor of the view of the question entertained by the court below. On written contracts made by an agent without authority, if his name does not appear in the contract, and he contracts for his principal only, an action against him on such contract will not lie; but an action on the case for his wrongful act, in assuming to contract for another without authority, is the only remedy. But if an agent, acting without authority in attempting to bind another, although his name appears as agent for the principal, yet, if he does not employ language which will exclusively bind the principal, or if, rejecting the words which he had no authority to use, enough will remain to create a promise on his part, he will be personally liable on the contract.

This seems to be the rule deduced from the American cases, and they clearly overthrow the case of *Ballou v. Talbot*, (16 Mass. Rep. 461. American Leading Cases, 457.) In the case under consideration, if we reject the false description—the agent appended to his name, there is a contract on his part to pay the money sued for.

Judge Ryland concurring, the judgment will be affirmed.

Hite v. Hunton.

HITE *et al.*, Defendants in Error, v. HUNTON, Plaintiff in Error.

1. A defendant after appearance cannot take advantage of a variance between the petition and the summons in the names of the plaintiffs.
2. The insertion of an "&" between the christian and sir-name of a plaintiff in the caption of a petition, may be summarily amended.

Error to Benton Circuit Court.

The case is stated in the opinion of Judge Ryland.

F. P. Wright, for plaintiff in error.

Gardenhire, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

The plaintiffs filed their petition against the defendant in the Benton Circuit Court. The petition is in the name of Ormsby Hite and Abraham Hite, merchants, trading under the name and style of "Ormsby Hite & Co.," plaintiffs, against Felix Hunton, defendant. The plaintiffs state that said defendant, by his promissory note hereto annexed, dated the eighteenth of October, eighteen hundred and forty-three, promised, for value received, to pay the said plaintiffs, by their copartnership name of Ormsby Hite & Co., one day after date, the sum of two hundred and twenty-one dollars, which, and the interest thereon, are yet due, and for which the plaintiffs ask judgment." The summons issued, requiring the defendant "to answer the complaint of Ormsby & Hite and Abraham Hite, plaintiffs." At the return term of the writ, the parties appeared, and time was given to defendant to file his answer at any time within sixty days from the end of the term. Within the time allowed, the defendant filed the following answer.

"Ormsby & Hite and Abraham Hite *vs.* Felix Hunton. This defendant, Felix Hunton, here says that he never executed or made any note whatever payable to Ormsby & Hite and Abraham Hite, as stated in the plaintiffs' petition, and he does not owe any such note or any part of any such note; that he never

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made or executed to the plaintiffs, Ormsby and Hite and Abraham Hite, partners, by the name of "Ormsby & Hite," any such note as is described in the plaintiffs' petition."

At the same time, he also filed his motion to quash the writ, 1, because there is no summons in favor of Hite & Co.; 2, because the summons is in favor of Ormsby and Hite and Abraham Hite, and the note filed in the case shows no indebtedness or contract with such parties; 3, because the note filed herewith shows no indebtedness from defendant to said Ormsby and Hite and Abraham Hite; 4, because the summons and petition do not correspond as to the names of plaintiffs and defendant. At the next term of the court following, the defendant asked leave to file an amended answer, which was granted, and which answer is as follows:

"Ormsby & Hite & Abraham Hite, merchants, trading under the name and style of Ormsby Hite & Co., plaintiffs, against Felix Hunton, defendant. In the Benton Circuit Court." The defendant, Felix Hunton, for answer to said petition, states that he never executed or made any such note whatever payable to Ormsby & Hite & Abraham Hite as stated in plaintiffs' petition, and he says he does not owe any such note, or any part of any such note; and defendant further says, that he never made or executed to plaintiffs, Ormsby & Hite & Abraham Hite, by their copartnership name of Ormsby, Hite & Co., any such note as described in plaintiffs' petition; and defendant denies that, by his promissory note, dated the eighteenth day of October, eighteen hundred and forty-three, he promised to pay the said Ormsby & Hite & Abraham Hite, by their copartnership name of Ormsby, Hite & Co., the said sum of two hundred and twenty-one dollars, or any part thereof; and he denies that the same, or any part thereof, is still due said plaintiffs, Ormsby & Hite & Abraham Hite, as set forth, stated and described in plaintiffs' petition."

The plaintiffs moved to strike out the answer, because the answer does not respond to the petition of the plaintiffs; because it is wholly irrelevant in this, that the suit is brought by

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Ormsby Hite and Abraham Hite, and the answer responds to the action as if it were brought by Ormsby & Hite and Abraham Hite, and the said answer contains no defence.

The court sustained the plaintiffs' motion and struck out the defendant's answer, and then ordered that the suit be stated as follows: "Ormsby Hite & Abraham Hite, plaintiffs, against Felix Hunton, defendant"—who appear to be the real parties. In the caption of the original petition, there seems to have been something between "Ormsby" and "Hite" which might have been taken for a part of the "H" or an "&."

The defendant, failing to file any other answer, judgment was rendered against the defendant. The defendant filed his motion to arrest the judgment, which motion was overruled. The defendant then filed his bill of exceptions to the various rulings of the court.

I have thus spread the various acts of the parties and the court in full in this opinion, and upon looking into them, find nothing requiring the interference of this court. The petition, either originally or as amended, is for the proper parties and in the name of the proper plaintiffs, viz: Ormsby Hite & Abraham Hite. The mistake of the clerk in the summons gave rise to all the various motions of the defendant. The variance between the summons and petition cannot be taken advantage of now as formerly by the rules of the common law. The petition is the commencement with us, and the object of the summons is to bring the defendant before the court; when there, he must answer the petition and not the summons. The petition and note annexed inform the defendant of the cause of action; he knew the plaintiffs; the face of the note showed him who were the persons suing in the petition, and the petition itself shows this. At the return term, the defendant gets leave to answer, and he files what he calls his answer and his motion to dismiss too. It is too late to move to dismiss after answering, and an answer and a motion to dismiss at the same time being filed, the answer is a virtual waiver of the motion to dismiss. "A misnomer of the plaintiff could only be pleaded in

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abatement, and was no ground for setting aside the proceedings, or for a motion in arrest of judgment, or of non-suit at the trial; at least, if it appeared that the defendant was aware that the action was brought by the person who actually sues." (1 Chitty's Pleading, 282. *Dunbar v. Craig et al.*, 2 Wheaton's Rep. 45.) Such was the practice at common law. But here the only matter relied on to dismiss the suit is the variance between the petition and the summons. This court held, in *Jones v. Cox et al.* (7 Mo. Rep. 173,) that a variance between the declaration and the writ cannot be taken advantage of on a motion to quash; also held that, where the summons varies from the declaration, the court may permit the summons to be amended, and such act is no ground for a continuance. Judge Scott, in this case of *Jones v. Cox*, says: "If a variance between the declaration and writ can be taken advantage of at all, it is not seen on what principle a party can avail himself of it by motion to quash. According to our practice, the declaration is filed before the writ issues, and the declaration being the foundation of the writ and accompanying it, the party would look to it in order to ascertain the nature of the demand against him and by whom it was instituted; a variance between it and the summons cannot mislead him;" and now it may be taken as the decision of this court, that no such variance can be taken advantage of. I repeat that the object of the writ is to bring the party into court, and when there, he must answer the petition or demur to it. He has nothing to do with the writ. The court below has ample power to make amendments in its proceedings. Petitions may be amended whenever justice will be promoted thereby. Here the court ordered the case to be properly stated, and the defendant's answer not being responsive to the petition, but rather an evasive effort at special pleading, and being what might almost be said to be a negative pregnant—almost a confession that the note was given and debt due to Ormsby Hite & Co., that is, to Ormsby Hite & Abraham Hite, and the defendant failing to file a proper or directly

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responsive answer, the judgment below was properly rendered against the defendant, and will, therefore, be affirmed; Judge Scott concurring.

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WOOTON & WOOTON, Respondents, *vs.* HINKLE, Appellant.

1. Partition sale set aside, where it appeared that the bidders, for the purpose of obtaining the property at a sacrifice, agreed that one should become the purchaser, and the others refrain from bidding, in consideration of sharing the benefits of the purchase.

Appeal from Lafayette Circuit Court.

This was a proceeding to set aside a partition sale of certain real estate, of which Hinkle became the purchaser. The cause was submitted to the court without a jury, and the following facts were found:

Before the sale, Samuel B. Shannon, John S. Shannon and Captain Trigg agreed among themselves to purchase the land at the sale, provided it did not sell for more than twelve dollars per acre, and authorized S. B. Shannon to attend the sale, and bid that price for the land. In pursuance of this agreement, S. B. Shannon attended the sale, and when the land was put up by the sheriff, bid the first time three dollars per acre. There were between thirty and fifty persons present at the sale. Hinkle was not present at first, but afterwards came up, and after making some inquiries, commenced bidding for the land. Several bids were made by Hinkle and S. B. Shannon respectively. Shannon having made the last bid, Hinkle took him aside, and it was then agreed between them that Hinkle should bid off the land, and the same should be equally divided between them. They then returned to the place of sale; Hinkle made a bid over Shannon's last bid, and Shannon, in pursuance of the agreement, refrained from bidding any more. The land was knocked off to Hinkle at six dollars and fifty cents an acre, or about one half its value. There were no other bid-

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ders present at the sale. The court further found that the agreement between Hinkle and Shannon was made for the purpose of preventing competition between them. Upon these facts, the court declared the law to be that the agreement between Hinkle and Shannon was a fraud upon the owners, and accordingly set aside the sale.

Hinkle, the purchaser, filed a motion for a review of the facts and law, which was overruled, and he appealed to this court.

Hayden, Napton and Morrow, for appellant, cited *Phippen v. Stickney*, 3 Metcalf, 384. *Small v. Jones*, 1 Watts & Serg. 136. 2 Const. Rep. (S. C.) 821. 3 Gilmer, 529. 11 Paige, 431. 2 Kent's Comm. (7th ed.) 700.

J. R. Troxell, for respondents, cited 1 Story's Eq. Juris. p. 310, §293 and authorities there cited. (*Blight's Heirs v. Tobin*, 7 Monroe, 612. *Mills v. Rogers*, 2 Littell's (Ky.) Rep. 217.)

SCOTT, Judge, delivered the opinion of the court.

There was a motion made for a review of the facts found, but as, in our opinion, the evidence warranted the finding of the court, we shall proceed to examine the questions of law arising upon the record as presented.

At one time, the law in England seemed to be settled that the employment of puffers at auctions was illegal. (*Bexwell v. Christie*, Cowp. 395.) Afterwards, acts of parliament imposing a duty on sales of estates at auction, created a different opinion, and seem to have sanctioned the practice. (Sug. on Vend. 24. 1 Fonb. 178.)

-In America, where the subject has not been controlled by legislation, the opinion is generally entertained that it is against sound policy and fair dealing to employ a person to bid secretly for the owner against a *bona fide* bidder at a public auction. (2 Kent, 539.)

According to Cicero, a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person

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to depreciate the value of an estate intended to be sold. And Huber lays it down that, if a vendor employs a puffer, he shall be compelled to sell the estate to the highest *bona fide* bidder, because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer. (Sug. 23.)

Our laws would justly be chargeable with the censure of neglecting the interests of vendors, if, while they prohibited them from employing puffers at auctions of their estates, they suffered purchasers, by unjust combinations among themselves, to obtain their property at a sacrifice. But our law is not obnoxious to this censure. While, on the one hand, it protects purchasers from the influence of fictitious biddings and false appearances produced by the conduct of puffers; on the other, it equally protects the rights of the vendor, and will not permit purchasers, by illegal combinations and arrangements among themselves, to obtain his estate at an under price.

Story, in his equity jurisprudence, states the law to be that agreements, whereby parties engage not to bid against each other at a public auction, especially in cases where such auctions are required by law, are held void; for they are unconscientious and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and to mislead private confidence. They operate virtually as a fraud upon the sale. (1 vol. sec. 293.)

The courts in New York maintain that the forbearance of bidding at a public auction is a consideration for a contract that ought not to be sanctioned in law; that the law, at judicial sales, is anxious to produce a fair competition among bidders, and, as combinations have the effect of preventing such competition, they are against the policy of the law and void. (*Jones v. Caswell*, 3 John. cases, 29. *Dootin v. Ward*, 6 Johns. Rep. 194.)

None of the cases cited by the appellants impugn this doctrine. The case of *Loomis v. The National Fire Ins. Co.*, (11 Paige, 431,) decides that a real bidder, at a public sale, may either bid in person or by his agent duly authorized. The

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case of *Phippen v. Stickney*, (3 Met. 384,) was an action arising out of an agreement between two persons that one of them should purchase the land to be sold at auction and convey it to the other, the purchaser participating in some of the advantages. In this case, the court says, the extent to which the doctrine of invalidating such contracts can safely be carried, would rather seem to embrace within the rule all cases of fraudulent acts and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. The case of *Small v. Jones*, (1 Watts & Serg. 128,) contains nothing contravening that just above cited; it maintains that a combination of interests to purchase property at a sheriff's sale will be valid or not, according to the views with which it is made. If it is effected with the design to depress the price, it will be void. But that there may be circumstances which will render a combination at a sale lawful, when it is entered into with no improper view. The case of *Switzer v. Skiles*, (3 Gilman, 529,) contains nothing inconsistent with the doctrine of the above cases. That was a sale of the public lands of the United States. A town had previously been laid out upon the land, and the owners of lots deputed one of their number to bid for the tract on which their town had been built. Nothing more appears.

The case of *Jenkins v. Hogg*, (2 Con. S. Car. Rep. 821,) does not affect the question involved in this controversy. If it is cited for the purpose of showing that the employment of puffers at auctions is warranted by law, its authority would scarcely be recognized at this day. The facts in this case show that there was a combination to obtain the property sold at a sacrifice by those who purchased it. When arrangements are made to effect that object by the purchasers at a sale, the law deems them fraudulent. It is a fraud on the sale, to make a combination by which the property is acquired at a price below its value. The law imputes fraud to such conduct, and the court was warranted in inferring its existence from the facts

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found. It is of importance that these sales in partition should be preserved free from all influences, which may depreciate the value of the land sold. Such sales rarely take place but where infants are interested, and they are too frequently prompted by a desire to obtain their inheritance, and that, too, at a sacrifice. Under such circumstances, courts cannot be too vigilant in guarding every avenue to improper practices in conducting them.

Judge Ryland concurring, the judgment will be affirmed.

NEAL *et al.*, Plaintiffs in Error, *vs.* STONE *et al.*, Defendants in Error.

1. A court cannot refuse to entertain a motion to set aside a partition sale because all interested do not join in the motion.
2. A partition sale will be set aside, where the evidence shows any collusion or contrivance to enable the purchaser to obtain the land below its real value.

Error to Cooper Circuit Court.

This was a motion to set aside a sheriff's sale in partition. The parties to the partition suit were the heirs of William Stone, deceased, only a portion of whom joined in this motion.

At the hearing, it appeared that the land sold consisted of parts of two adjoining quarter sections, comprising in all upwards of one hundred and eighty acres. It was admitted that the land was sold pursuant to the order of court to George W. Smith, on a credit of twelve months, for the price of six hundred dollars; that the purchase money was still unpaid and no deed had been made. Notice of the sale was duly given in a newspaper, and no question was made of its sufficiency. It described the two tracts to be sold, but did not specify whether they were to be sold separately or in a body.

The sheriff who made the sale testified that it was made pursuant to notice, at the usual hour, while the court was in session; that only two of the heirs were present, viz: Joshua

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Lewis and Nathan Neal, who was the father-in-law of Smith, the purchaser: the land was sold in one body by direction of Neal and Lewis, and knocked down to Smith at his first bid, no other bid having been made; no person expressed a desire to buy any lot or part of the land; at the request of Lewis, he proclaimed before the sale that there was a good log house on the farm, an orchard and a spring.

Amick testified that he lived near the land, and it was understood in the neighborhood that it was to be sold in lots; there were several persons in the neighborhood who wanted the land; some wanted it in lots, others in a body; witness attended the sale expecting it to be sold in lots, and if it had been thus sold, he would have bid five dollars an acre for one forty acre tract; a few minutes before the sale, he saw Smith and Neal talking privately together, and after this, the sheriff proclaimed for the first time that the land would be sold in one body; Smith had said before the sale that the land would be sold in one body, and witness made no bid; the land was worth six to seven dollars an acre.

Burke testified that he understood from the advertisement and from Nathan Neal that the land was to be sold in lots, and therefore he did not attend the sale, as he wanted it in a body; if he had known it was to be sold in a body, he would have attended and bid one thousand dollars.

Starke testified that he attended the sale because he expected the land to be sold in lots; saw the advertisement, and was told by Neal that it would be sold in lots; would have bid six dollars an acre for eighty acres, but did not want the whole tract, and so did not bid at all; thinks the land would have brought considerably more if it had been sold in lots; saw Neal and Smith talking privately together, and immediately afterwards it was announced that the land would be sold in a body; does not know what would have been given for other tracts, or whether any one was present who would have bid for them at all, if they had been put up in lots.

This is the substance of all the evidence in the record. The

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motion to set aside the sale was overruled, and the movers bring the matter to this court by writ of error.

Adams and Hayden, for plaintiffs in error.

Gardenhire, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

1. The objection that all the parties injuriously affected by the acts of the sheriff in conducting the sale did not unite in the motion to set it aside, should have its weight in determining this question, but cannot prevail to the extent of preventing its consideration by the courts. As this is a summary proceeding by motion to set aside the sale, it may be regarded as a step in the original cause to which all proper parties were made. Courts are impressed with a sense of the policy of sustaining judicial sales, and are aware of the evil consequences which may result from invalidating them on slight grounds. But this policy must not be so rigidly adhered to, as to create the impression that bad faith or collusion will escape animadversion. When sales are fairly conducted by all those concerned in them, they will not on trivial grounds be disturbed.

The evidence shows that, by the management of those who reaped the advantage, the property in this instance was sold at a price considerably below its value. By the contrivance of the father-in-law of the purchaser, those who would have attended the sale were induced to absent themselves, and the property was afterwards sold in a manner to prevent those from bidding who did attend. The father-in-law being a party to the suit, and interested in the proceeds of the sale, his representations were calculated to influence those who desired to attend the auction.

In conducting a sale of this kind, the sheriff is the agent for all interested, and he should not be controlled by the directions of any one. He should exercise his own discretion, and, governing himself by circumstances, he should conduct the sale in such way as, in his judgment, will obtain the greatest price for the estate sold. Lumping sales are narrowly watched, and

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they will generally be discountenanced when complaints are made against them. Still, there are cases in which a whole tract of land, if all its parts are contiguous, would be best sold altogether, although it may consist of many congressional subdivisions. When the sheriff is disposed to discharge his duty impartially, it is an easy matter to ascertain what is best to be done. As it appears that the sheriff suffered himself to be controlled by those who obtained the property at an under price, the sale should have been set aside.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

DOAN, Respondent, vs. MOSS, Appellant.

1. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposited with him a chattel as a pledge for his indemnity, and thereupon, the note was given, merely as evidence of the deposit. *Held*, a good plea of want of consideration.

Appeal from Audrain Circuit Court.

Action by Doan, the assignee, against Moss, the maker of the following note:

“Due John S. Bishop three hundred dollars, for value received of him. September 2, 1853.

“THOMAS T. MOSS.”

The defendant answered, admitting the execution of the note, but alleging that it was executed under the following circumstances: Defendant being security for Bishop to a considerable amount, Bishop delivered to defendant, for his indemnity, a jack, of the value of one hundred dollars, or one hundred and twenty-five dollars, which was to be held by defendant until Bishop should in some way discharge him from all liability as surety, and was then to be returned. Bishop asked for some writing as evidence of the transaction, so that he might not lose

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the jack, in case defendant should die. Bishop then wrote or caused to be written the note sued upon, and defendant signed the same, with the understanding that it was never to be collected, in whole or in part, and was to be returned to defendant whenever, being secured against all liability as surety, he returned the jack. The answer further alleged that the assignment was without consideration and fraudulent. This is the substance of every material allegation. This answer was stricken out by the Circuit Court, and judgment entered for the plaintiff.

Jones & Rickets, for appellant.

S. A. Young, for respondent.

SCOTT, Judge. The facts stated in the defendant's answer clearly showed that there was no consideration for the note sued on, and therefore the court erred in striking it out.

The nature of the defence of the maker of the note was not changed by the assignment, and the defendant is allowed to set up the defence he makes against the plaintiff (the assignee) in as ample manner as he could have made it against his assignor.

Judge Ryland concurring, the judgment will be reversed and the cause remanded.

MORROW'S ASSIGNEES, Plaintiffs in Error, vs. BRIGHT, Defendant in Error.

1. In an action by the general assignees of an insolvent, to recover a debt due the assignor, the defendant was allowed to set up as an equitable defence or set-off the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment.

Error to Ray Circuit Court.

This was an action by Morrow's general assignees for the benefit of creditors against Bright, for about eight hundred dol-

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lars due upon a note, account stated and agreement, all of which were included in the assignment. Bright pleaded as a set-off five hundred dollars paid by him since the assignment, on a protested note of Morrow's, on which he was endorser. The assignment was dated April 9, 1853. The note was given December 27, 1852, was protested before the assignment, and paid by Bright after the assignment. The offset was allowed by the Circuit Court, and the plaintiffs appealed.

Napton, for plaintiffs in error. 1. Morrow and Bright were not *mutually indebted* at the date of the assignment. There was nothing due by Morrow to Bright when the assignment was made, and if Morrow became indebted to Bright after the assignment, that is surely no set-off against the demand assigned. (13 Vermont, 440.) A debtor cannot, by his assignment, prevent a settlement of mutual subsisting indebtedness between himself and another; but he has a right to prefer some creditors to others, and to make such appropriations of his effects as he pleases. If the set-off claimed here be allowed, will it not place it in the power of the assignee's debtor at all times, to defeat the intentions of the assignor, and disarrange the order of claims, by buying up the claim of a postponed creditor, and in that way, procuring its full allowance, when by the directions of the deed of assignment, it would only get a *pro rata* share with other claims of its class? 2. There is no question of notice here, as the court below assumed the law to be that the set-off must be allowed, without regard to notice. 3. It cannot be pretended that the payment made on the protested note was an equitable defence or set-off against the plaintiffs, as it grew out of a transaction totally independent of the indebtedness assigned. (15 Mo. Rep. 399.)

Gardenhire and *Vories*, for defendant in error. 1. The interest of the plaintiffs in the insolvent's debts is exactly that of the insolvent himself, as it stood affected by countervailing equities at the time of the assignment. It is therefore immaterial whether the liability set up as a defence was originally absolute or *contingent*, the relations of the parties being unal-

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terable by the accidental insolvency of one of them. (*Krause v. Beitel*, 3 Rawle, 203. 1 Atk. 230. 2 Paige, 581. 1 Root's Conn. Rep. 427. 7 Mo. Rep. 524.) 2. It does not appear that the defendant had any notice of the assignment when he paid the note upon which he was endorser, and for that reason, if for no other, his demand is allowable as a strict set-off. (New Practice Act, art. 3, sec. 3.)

SCOTT, Judge, delivered the opinion of the court.

The only question in this case is, whether the defendant, Bright, is entitled to the benefit of the set-off which he claims, as against the plaintiffs?

The plaintiffs are the voluntary assignees of the insolvent Morrow, and their position in this action cannot be likened to that of an assignee for value of the specific debt which is sought to be recovered.

In the case of *Krause v. Beitel*, (3 Rawle, 199,) it was held that the interest of a trustee of an insolvent debtor in debts due to the insolvent, is exactly that of the insolvent himself, as it stood affected by countervailing equities at the time of the assignment.

Our statute, in suits brought by administrators and executors, allow debts existing against their intestates or testators and belonging to the defendant at the time of their death, to be set-off in the same manner as if the action had been brought by or in the name of the deceased. On this view of the subject, there would be no impropriety in allowing the set-off.

But the matter may be presented in another light. Bright could not sue Morrow to recover the money for which he was bound for him, until he had actually paid it. But this goes on a technical ground, peculiar to the action for money paid, laid out and expended. Money cannot be said to be laid out for another until money is actually paid on his account. But, in substantial justice, as Bright was Morrow's surety, and compellable by law to pay the debt, and as Morrow was insolvent,

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Bright may be regarded as the creditor of Morrow from the time the note was protested. Then, as there was an indebtedness on the part of Morrow to Bright, and as the very act of assignment was evidence of insolvency, by which Bright became absolutely bound, there was an equity against the demand of Morrow at the time of the assignment, growing out of his indebtedness to Bright.

We do not consider that this action is affected by the third article of the present practice act. Jude Ryland concurring, judgment affirmed.



STUBBLEFIELD, Defendant in Error, vs. BRANSON, Plaintiff
in Error.

1. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale.

Error to Osage Circuit Court.

This was an action commenced before a justice of the peace, to recover the value of an improvement on public land.

At the trial in the Circuit Court on appeal, it appeared that the plaintiff never actually lived upon the land. The improvement consisted of a field inclosed by a fence. There was evidence tending to show that defendant promised to pay plaintiff for the improvement. The court instructed the jury to find for plaintiff if they believed there was such a promise, and that in consideration of it, the plaintiff relinquished possession of the improvement. An instruction that the plaintiff could not recover unless he was in *actual* possession when he sold to defendant was refused. There was a verdict for plaintiff, and the defendant brings the case to this court by writ of error.

E. L. Edwards, for plaintiff in error. The only interest which Stubblefield could have in the improvement was the possession, as he claimed no title to the land. If he did not have

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the actual possession, the contract would have been void for want of consideration, even if there had been an actual buying and selling, of which, however, there was no evidence. (4 Mo. Rep. 235. 6 Mo. Rep. 590.)

Parsons, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

1. The only point presented for our determination is, whether the sale of an improvement on the public lands of the United States is a sufficient consideration to support an agreement to pay for it, unless the claimant of such improvement actually resides upon the land. We do not consider the case of *Clark v. Shultz*, (4 Mo. Rep.,) as furnishing any ground for the distinction between improvements, which may consist in part of dwellings occupied by the seller, and those on which there is no actual residence. A dwelling is spoken of in that case simply because the fact was, there was one on the improvement. Actual residence makes no difference in principle. It may be that one who is actually residing upon public lands submits to a greater inconvenience, in yielding up his improvement, than he who merely abandons to another an improvement without a dwelling upon it. But this makes no difference. There is a sufficient consideration in each case for a promise. The transfer of the improvement is a prejudice to the seller and a benefit to the purchaser, and therefore a valid consideration. The relinquishment of any improvement upon the public land, whether it consists of dwellings or not, is a sufficient consideration to support a promise. In states in which the public lands are situated, it is maintained that the sale of a claim or improvement is a sufficient consideration to support a promise, and this, in the nature of things, cannot depend on the character of the improvements which may have been made. It is enough that they are worth any thing, and if so, their abandonment, at the request of another, is a sufficient consideration to support a promise by him. (*Doyle v. Knapp*, 3 Scam. 337. *Freeman v. Holliday*, 1 Mor. (Iowa) Rep. 80.)

State, to use of Moutrey's Adm'rs, v. Muir.

This court does not interfere with verdicts on the ground that they are against the weight of evidence. Judge Ryland concurring, the judgment will be affirmed.

THE STATE, TO THE USE OF MOUTREY'S ADM'RS, Plaintiff in
Error, vs. MUIR & RITTER, Defendants in Error.

1. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state.
2. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law.

Error to Jackson Circuit Court.

This was an action against the securities in a constable's bond, for failure to return an execution and pay over money collected under it. The bond was conditioned that Presley Muir should "serve all process to him directed and delivered, pay over all moneys by him collected, and in all other respects well and truly do and perform, all and singular, the duties that now are or may be enjoined upon him by law to do and perform as constable of Kaw township."

The cause was tried by the court without a jury, and the following facts found:

Muir was in August, 1850, elected constable of Kaw township for the term of two years, and entered into bond, with the defendants as sureties. During a portion of the year 1851, and up to August, 1852, Ross acted as the deputy of Muir, and was by Muir recognized as such, but no written appointment was filed in the office of the clerk of the county court, as required by law, nor did it appear that there was any written appointment. In April, 1852, the beneficiary plaintiffs recovered a judgment before a justice of the peace in Kaw township. On the 20th of April, 1852, execution upon said judg-

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ment, directed to the constable of Kaw township, returnable in sixty days, was issued and placed in the hands of Ross, the deputy. Ross collected the money under the execution, but failed to pay it over, or to return the execution. In July, 1851, Presley Muir removed with his family to Wyandott, in Nebraska territory, and had since continued to reside out of the state of Missouri.

Upon these facts, the Circuit Court declared that the defendants were not liable. The plaintiffs moved for a review of the law and facts, but their motion was overruled, and they appealed to this court.

Smart and Sheley, for plaintiff in error. 1. It is sufficient to prove that sheriffs, constables and other peace officers acted as such to render them liable. (*People v. Collins*, 7 Johns. 549. *Potter v. Luther*, 3 Johns. 431. *Hart v. Robinett*, 5 Mo. Rep. 11. 9 Wend. 17. 3 Scammon, 483. 4 T. R. 366. 1 Pick. 273.)

J. B. Hovey, for defendant in error. 1. By the removal of Muir from the state, his office as constable became vacant, and the defendants were not liable for any subsequent acts of his deputy. (R. C. 1845, tit. Constables, secs. 1 and 10.) 2. Muir never had a deputy within the meaning of the law. (Same act, sec. 7.)

SCOTT, Judge, delivered the opinion of the court.

1. The plaintiff moved for a review of the finding of the court below, but we do not deem it necessary to revise the action of the court in that matter; for taking the facts as found, the judgment for the defendants was not warranted by law.

If the principal in the bond would be liable for the act of the deputy, the rule is not perceived on which the sureties would be discharged. The surety in an obligation is bound to the same extent thereby as the principal. If this was a proceeding against the constable for unlawfully exercising his office, or if the constable was plaintiff, asserting his right to the office, very different considerations would arise from those which must de-

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termine this cause. There is no dispute but that the act complained of was done during the term for which the principal was elected, and for which the securities were bound. The defence set up is, that the principal, by his acts, had deprived himself of his office. Not that he had resigned, and his resignation had been accepted, but by his improper conduct, in becoming a non-resident, he had forfeited or vacated his office. Would it not be a monstrous defence for an officer to make, when called upon for money which he had collected by virtue of his office, to say that he had forfeited his office before the money was received, and therefore he had no right to receive it. When an officer is sued for malfeasance in office, it is enough to show that he is an officer *de facto*; his not being so *de jure* also, is not an objection that can be made available to defeat or in any way affect the interests of third persons. (Cowen's Notes, 555.) We have said that, if the law holds the officer liable, there is no principle on which his sureties can be discharged. If men will go sureties for others, they cannot complain if they are made responsible for their acts. There is no hardship in this; the sureties might at any time, under the statute, have discharged themselves. The statute itself contemplates a case in which six months' absence from the state by the principal does not release the sureties. (R. C. 1845, tit. Securities, sec. 14.)

2. The provision in the statute requiring the appointment of a deputy constable to be filed in the office of the clerk of the county court, is merely directory. The principle in relation to officers *de facto*, when the rights of third persons are concerned, is applicable as well to deputies as their principals; and, if the deputy acts with the consent of his principal, the principal will be bound for his conduct. Proof of a person's acting as under sheriff, is sufficient proof of his authority to do any act necessary in the course of his office. (*Berryman v. Wise*, 4 T. R. 366.) There is no pretence here but that the deputy constable was appointed by the principal in whose name he acted. If the plaintiff should lose her debt by reason

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of the omission to file the deputy's appointment in the office of the clerk of the county court, such omission being a breach of the condition of the bond, these sureties, who would now take advantage of such neglect, would be liable on the bond for such failure. Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

TAYLOR *et al.*, Respondents, vs. WILBURN *et al.*, Appellants.

1. Where a will is impeached for undue influence exercised over the weak intellect of the testator, the inquiry is, not merely whether an undue influence was exerted *at the time* of the execution of the will, but whether an undue influence had been acquired, and operated upon the testator in the disposition of his property.

Appeal from Montgomery Circuit Court.

This was a proceeding commenced in the Callaway Circuit Court to vacate the will of John Wilburn, previously admitted to probate in the county court, on the grounds of his alleged mental incapacity to make a will, and of undue influence exercised by his wife over his weak intellect. The petitioners were his daughters and their husbands, and Sinclair Wilburn, one of his sons. The statutory issue was made and tried by a jury, who could not agree upon a verdict. Another trial was had, and resulted in a verdict against the validity of the will. A new trial being granted, a change of venue was taken to the Circuit Court of Montgomery county, where a trial was had at the October term, 1852, which resulted in another verdict against the will.

At the trial, the petitioners read in evidence the will, dated October 27, 1847, executed in due form, and attested by three subscribing witnesses. The testator devised all his real estate to his wife, during her life, and after her death, to John and Robert, his two youngest sons and their heirs forever, and all his personal estate to his wife absolutely.

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There was evidence tending to show that, for many years before Wilburn's death, he was in a weak state of mind, incapable of properly managing his own affairs, and controlled by his wife in all his business transactions, and that he never made a bargain or trade without her advice and consent. There was evidence of declarations made by Mrs. Wilburn, before the death of her husband, that some of the petitioners should not get any of his property. There was evidence that Wilburn said, after the execution of his will, that he had given all his property to his wife during her life, but that if he had had his own way, he would have given a slave to each of his daughters. Witnesses, who had observed the unusual influence exerted over Wilburn by his wife, gave it as their opinion that he was not capable of making his own will. On the other hand, there was evidence tending to show that Wilburn, though not a man of strong mind, was capable of managing his own affairs, and had accumulated a large property by his thrift as a farmer; that he made close bargains and was watchful of his own interests. Cave, one of the subscribing witnesses, testified that Wilburn came to him while attending court, and asked him to come to his house and write his will. It was written in the presence of Wilburn and his wife. Mrs. Wilburn did not direct or dictate how the will should be written. After it was written, it was read over, and Wilburn asked his wife if it was right, to which she replied that it was. Witness thought that Wilburn was in his right mind, and capable of making his own will.

The court gave the following instructions asked by the petitioners :

1. Unless the jury believe from the evidence that John Wilburn was of a sound mind, at the time he executed the instrument purporting to be his will, they will find the issue for plaintiffs.

2. If the jury believe from the evidence that the mind of John Wilburn was so impaired by sickness, age, or any other cause, at the time of executing said instrument, as to subject him to the dominion and control of his wife, and that she ex-

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exercised such a power and control over his mind, in the disposition of his property by said instrument, as to destroy his liberty and free agency, and cause it to be made to suit her purposes and not his, then they will find the issue for the plaintiffs.

3. Although unsoundness of mind and undue influence are neither to be presumed in the absence of proof, yet each may be inferred and established by circumstances, such as the acts, words, condition, relation and circumstances of the parties, each to the other.

11. If the jury believe from the evidence, that Mary Wilburn procured the making of the instrument in question by John Wilburn by threats or frequent importunities, which, on account of his weakness and infirmity of mind, he could not resist, and for the sake of peace, yielded to her wishes and made it different from what he had intended and would have done but from that influence, then they must find that it is not the will of John Wilburn.

Other instructions asked on behalf of the plaintiffs were refused. All the instructions asked by the defendants were given. By the first, the jury were directed to establish the will, unless they believed the testator was of unsound mind when he executed it, or that he executed it through the undue influence of his wife.

After a verdict against the will, the defendants appealed to this court.

Thomas Ansell, for appellants, upon the whole case cited the following authorities: *Stewart's Ex'rs v. Lispinard*, 26 Wend. 255. *Rambler v. Tryon*, 7 Serg. & Raw. *Kinne v. Kinne*, 2 Conn. 102. 2 B. Monroe, 109. Jarman on Wills, 36-7-8-9, 50-1-2-3. 4 Wash. C. C. R. 262. 2 Starkie's Ev. 1275, notes. 1 Iredell, 209. *Brown v. Miller*, 3 Wharton's Rep. 2 Greenl. Ev. §688 note 5. 4 Greenl. Rep. 220-3. 1 Harrington, 451 *et seq.*

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36-40. 7 Serg. & Raw. 92. 9 B. Monroe, 30. 5 Gill & J. 269. 9 Grattan, 333. 1 Cox, 355. 1 Story's Eq. §222, 234, 237-8.

SCOTT, Judge, delivered the opinion of the court.

There is no doubt but that the burden of proof in this case was upon the petitioners or plaintiffs. They did not deny the execution of the will, but set up such weakness and infirmity of intellect, caused by sickness and age, as rendered the testator not of a sound and disposing mind, and such an influence exercised over him as vitiated his will. But in making this admission, we cannot see any consequence resulting from it injurious to the plaintiffs by reason of the first instruction given at their instance by the court. That instruction directs the jury to find for the plaintiffs, unless they believe from the evidence that John Wilburn was of sound mind at the time of making his will. Now this instruction did not relieve the petitioners from the burden they had assumed of showing insanity in the testator. The instruction is to the effect that the insanity of the testator must be shown by the plaintiffs in order to obtain a verdict. To say that the act of a man is void, unless he was of sound mind when he performed it, is the same thing as to say the act of a man of unsound mind was void. When the objection to the validity of a will is the insanity of the testator, it is generally sufficient to show that he was of a sane mind at the time of its execution. But where a will is impeached for undue influence exercised over a weak intellect, and that too, by one holding the close and constant relationship of a wife, it is not sufficient to show that the testator was not under restraint at the moment of the execution of the will. Such is the nature of the human mind, that when it has been habituated to the influence of another, it will yield to that influence and suffer it to have its effect, although the person in the habit of its exercise may not be present or exert it at the time an act is done. So that the inquiry, in such cases, is not whether an undue influence was exerted at the time of the execution of the will, but whether an

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exercised such a power and control over his mind, in the disposition of his property by said instrument, as to destroy his liberty and free agency, and cause it to be made to suit her purposes and not his, then they will find the issue for the plaintiffs.

3. Although unsoundness of mind and undue influence are neither to be presumed in the absence of proof, yet each may be inferred and established by circumstances, such as the acts, words, condition, relation and circumstances of the parties, each to the other.

11. If the jury believe from the evidence, that Mary Wilburn procured the making of the instrument in question by John Wilburn by threats or frequent importunities, which, on account of his weakness and infirmity of mind, he could not resist, and for the sake of peace, yielded to her wishes and made it different from what he had intended and would have done but from that influence, then they must find that it is not the will of John Wilburn.

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Thomas Ansell, for appellants, upon the whole case cited the following authorities: *Stewart's Ex'rs v. Lispinard*, 26 Wend. 255. *Rambler v. Tryon*, 7 Serg. & Raw. *Kinne v. Kinne*, 2 Conn. 102. 2 B. Monroe, 109. Jarman on Wills, 36-7-8-9, 50-1-2-3. 4 Wash. C. C. R. 262. 2 Starkie's Ev. 1275, notes. 1 Iredell, 209. *Brown v. Miller*, 3 Wharton's Rep. 2 Greenl. Ev. §688 note 5. 4 Greenl. Rep. 220-3. 1 Harrington, 451 *et seq.*

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SCOTT, Judge, delivered the opinion of the court.

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exercised such a power and control over his mind, in the disposition of his property by said instrument, as to destroy his liberty and free agency, and cause it to be made to suit her purposes and not his, then they will find the issue for the plaintiffs.

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SCOTT, Judge, delivered the opinion of the court.

There is no doubt but that the burden of proof in this case was upon the petitioners or plaintiffs. They did not deny the execution of the will, but set up such weakness and infirmity of intellect, caused by sickness and age, as rendered the testator not of a sound and disposing mind, and such an influence exercised over him as vitiated his will. But in making this admission, we cannot see any consequence resulting from it injurious to the plaintiffs by reason of the first instruction given at their instance by the court. That instruction directs the jury to find for the plaintiffs, unless they believe from the evidence that John Wilburn was of sound mind at the time of making his will. Now this instruction did not relieve the petitioners from the burden they had assumed of showing insanity in the testator. The instruction is to the effect that the insanity of the testator must be shown by the plaintiffs in order to obtain a verdict. To say that the act of a man is void, unless he was of sound mind when he performed it, is the same thing as to say the act of a man of unsound mind was void. When the objection to the validity of a will is the insanity of the testator, it is generally sufficient to show that he was of a sane mind at the time of its execution. But where a will is impeached for undue influence exercised over a weak intellect, and that too, by one holding the close and constant relationship of a wife, it is not sufficient to show that the testator was not under restraint at the moment of the execution of the will. Such is the nature of the human mind, that when it has been habituated to the influence of another, it will yield to that influence and suffer it to have its effect, although the person in the habit of its exercise may not be present or exert it at the time an act is done. So that the inquiry, in such cases, is not whether an undue influence was exerted at the time of the execution of the will, but whether an

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influence had been acquired, and did operate in the disposition of his property by the testator.

After one mis-trial and two verdicts against the will, this court would scarcely be warranted in pronouncing that the facts assumed in the second and eleventh instructions of the plaintiffs, were not warranted by the evidence. The first instruction given for the defendants was broader than the first given for the plaintiffs, but, so far as they relate to the question of the sanity of the testator, there was no inconsistency between them. This is sufficiently apparent from the considerations above stated. Nor is there any contrariety between the plaintiffs' first and third instructions.

As the evidence warranted the instructions given for the plaintiffs, and as all the instructions asked by the defendants were given, which fully explained the nature of the influence to be exerted, in order to invalidate a will, and as there have been one mis-trial and two verdicts against the will, we are satisfied that no advantage would ultimately result to the defendants from disturbing the judgment of the court below.

Judge Ryland concurring, the judgment will be affirmed.

HISSRICK, Appellant, vs. MCPHERSON, Respondent.

1. In this state, a plaintiff's book of original entries, kept by himself, is not admissible evidence in support of a demand for goods sold and delivered, with or without his suppletory oath.

Appeal from Cooper Circuit Court.

P. R. Hayden, for appellant. The plaintiff should have been permitted to read his account book in evidence. (2 Phill. on Ev. p. 682-3, 691. Cowen & Hill's note, 491. *Beach v. Mills*, 5 Conn. Rep. 496-7. 1 Greenl. Ev. §117, 118, note 1. 1 Smith's Lead. Cases, top p. 304 and notes. *Ingraham v. Bockins*, 9 Serg. & R. 285. *Curran v. Crawford*, 4 S. & R. 3. 12 Pick. 139. 13 Mass. 427. 1 Rawle, 441.

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A. Leonard, for respondent. A party's own original account book of sales, with or without the suppletory oath, is inadmissible in evidence. In the English courts, this evidence is never allowed. (3 Barn. & Ald. 142. *Sickles v. Mather*, 20 Wend. 72. *Price v. Torrington*, 1 Salk. 285. 11 Mees. & Wels. 773. *Pittman v. Maddox*, 2 Salk. 690. *Case v. Potter*, 8 J. R. 211. *Beach v. Mills*, 5 Conn. Rep. 696. *Sterrett v. Bull*, 1 Binn. 237. *Poultney v. Ross*, 1 Dall. 238.) In the United States, there is great variety of opinion on this subject. (1 Smith's Lead. Cases, 294-315, where the cases are collected. Cowen & Hill's notes, part 1, p. 682, 701, note A. 2 Wheat. Rep. 117, 118. 1 Greenl. Ev. §118, 119 and notes. *Eastman v. Moulton*, 3 New Hamp. 156. *Beach v. Mills*, 5 Conn. Rep. 696. *Vosburgh v. Thayer*, 12 J. R. 462. *Decamp v. Vandagrass*, 4 Blackf. 272. *West v. Poinder*, Walk. 303.)

In this state, the question has never been settled, but the practice at the circuits, it is believed, has always been against the evidence; and it is submitted that the old law is safer and better than the new, and that such is the experience of some of the states where the innovation has been allowed. (Per Cowen, Judge, in *Sickles v. Mather*, 20 Wend. 72. Sedgwick, Justice, in *Cogswell v. Dollwer*, 2 Mass. 222. Platt, Justice, in *Vosburgh v. Thayer*, 12 J. R. 462.)

SCOTT, Judge, delivered the opinion of the court.

This was an action begun by the appellant against the respondent, on an account for butcher's meat furnished to respondent, who kept a hotel in Boonville. The plaintiff proved that he was a butcher and sold meats on a credit to the defendant. Having no other proof in support of his demand, he then offered to read in evidence the original account book, in which he had daily made his entries of the sales of meats, supported by an affidavit that his account was just and correct. The court refused to admit this evidence, to which the plaintiff excepted,

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and afterwards submitted to a non-suit, and brought his case to this court.

1. The only question presented for our determination is, whether the original book of entries made by the plaintiff, with his suppletory oath, is competent evidence in support of his demand. None of the books maintain that there is any foundation in the common law for the admission of such evidence. Lord Torrington's case is to the extent that courts have gone in allowing such evidence to be received. There the drayman, who delivered beer to his employer's customers, went every night to the clerk and had an entry made of each delivery. This statement of the quantities delivered, and of the names of the persons to whom the beer was delivered, was signed by the drayman and clerk. The drayman afterwards died, and it was held that the entries thus made and authenticated by the drayman, were evidence for his employer against those to whom the beer was delivered. (*Price v. Torrington*, Salk. 285. 2 Lord Ray. 873.) This was upon the principle that the hearsay of persons speaking against their own interest is admissible. These entries were evidence against the drayman, and were acknowledgments of the quantity of beer he had received from the employer to be accounted for. Even this rule has been encroached upon, and there is a disposition to narrow it. Thus it has been held that, in order to make such entries evidence, it must appear that the shopman is dead; that he is abroad and not likely to return, is not sufficient. (*Cooper v. Marsden*, 1 Esp. 1.)

We do not deem it necessary to trace the origin and history of the rule which allows evidence such as was rejected in this case, in some of the states of the Union. It is enough to know that such a rule has never been recognized in the administration of the law in this state, and that it is murmured at in states in which it has been introduced. A case is not remembered, in which an attempt has been made to sustain such a rule by the opinion of this court. It is obvious that to permit a party to recover a debt, sustained only by his own affidavit,

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would be multiplying the temptations to perjury. Where the rule has been introduced, the courts have felt the necessity of laying it under restraints and qualifications which can only come appropriately from the law-making power.

This principle, having had no previous existence in the practice of our courts, it may be questioned whether, under the present act regulating practice at law, there is any warrant for its introduction. This act prescribes that a party to an action may be examined as a witness at the instance of the adverse party. The statute having regulated the manner in which a party shall be introduced as a witness, all other modes of such introduction would seem to be impliedly prohibited. The reason of the rule which obtains in some of the states, is the necessity of the case, as the business carried on by a tradesman may be so small as not to warrant the employment of a clerk, and thus he would be without a witness to his dealings with his customers. As the demands of such tradesmen are usually inconsiderable in amount, and within the jurisdiction of a justice of the peace, the provision which was introduced in 1820, which allowed both parties to be examined as witnesses in all suits on notes, bills, or assumpsit, or on book account, when the plaintiff's demand was controverted, may be regarded as a substitute for the rule established in some of the states. That provision introduced in 1820, affecting justices' courts, with modifications, still continues in force.

The necessity for such evidence as is sought to be legalized by the judgment of this court, would be most sensibly felt in our probate courts, where the death of the debtor renders proof of an account necessary in all cases, as there are none to make admissions. Notwithstanding this consideration, we find our laws regulating administrations, as early as the 21st January, 1815, expressly prohibiting courts of probate from allowing any administrator for any disbursement, unless the demand against the estate was supported by such evidence as would have warranted a recovery in a suit at law. (Sec. 52.) This provision has continued in our code to this day, and shows that

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the subject was in the contemplation of the legislative power, and there was an entire omission to give the least sanction to the rule now sought to be introduced. The other judges concurring, the judgment will be affirmed.

HARBIN, Defendant in Error, *vs.* CHILES, Plaintiff in Error.

1. A judgment was rendered in California against a resident of Missouri upon publication. Afterwards, as shown by the record, the defendant appeared by attorney, filed an affidavit and asked leave to answer, which was granted on condition of payment of costs, but he failed to answer, when the former judgment was reinstated. *Held*, the judgment was conclusive in this state.

Error to Jackson Circuit Court.

Hovey & Sheley, for plaintiff in error. 1. The judgment, as originally entered in the Yulo District Court, was in the nature of a judgment *in rem*, and an action cannot be sustained on the same in this state. (*Sallee v. Hays*, 3 Mo. Rep. 116.) 2. The final judgment in this cause, in the Yulo District Court, is not a general judgment, nor judgment of recovery, but merely a re-instating of the former judgment—a mere revivor. (4 Mo. Rep. 222. *Ib.* 10. 3 Yerger, 426.)

Adams, for defendant in error, cited 2 Am. Lead. Cases, 552. 5 Wend. 148. 6 Wend. 453. 2 Bay, 485. 7 Cranch, 418-81. 3 Wheat. 334. 5 Gill & J. 500.

RYLAND, Judge, delivered the opinion of the court.

This is an action upon a transcript of a judgment of the District Court of Yulo county, in the state of California. Harbin sued Chiles in California, and had an order of publication in the newspapers of that state against him—constructive service only. The plaintiff then proceeded under the laws of that state, and obtained against defendant a judgment by default. After this judgment by default, Chiles appeared in court by

his attorney, and filed his affidavit, that is, Chiles' affidavit, and for reasons and causes therein set forth, moved the court to set aside the judgment by default, and for leave to answer to the plaintiff's action. This motion the court sustained, set aside the judgment, and granted defendant leave to file his answer in thirty days upon the payment of costs. The defendant failed to answer within the time allowed him, and the plaintiff, on his motion, had the original judgment reinstated against Chiles. This suit is upon a transcript of that judgment. The defendant relies upon his making no defence, no appearance to the action, never having been served with process, and that the California court had no jurisdiction of his person. The court below found the facts as stated, and declared the law to be against the defendant; that his appearance by attorney, and making his motion, and filing his affidavit in the court in California, gave that court jurisdiction over the person of said Chiles, and authorized a general judgment to be given, and that such was binding and conclusive upon him. This is in accordance with the doctrine heretofore laid down by this court, after elaborate argument and full investigation of the various authorities on the subject. (See case of *Warren & Dalton v. Julian H. Lusk*, 16 Mo. Rep. 102.) The principles declared by this court in this case of *Warren & Dalton v. Lusk*, are decisive of the case now before us. The doctrine there laid down, "that, when it appears from the face of the record, that the defendant had notice of the proceedings, that fact could not be controverted, as a record imports absolute verity," applied to this case, must at once settle the controversy.

Such a judgment as this would be binding and conclusive between the parties here, if given by our own courts, and we must give to this judgment of the court of a sister state, such credit, validity and effect as it has in the state where it was pronounced; for all that appears to the contrary, it was binding and conclusive between the parties in California, and will be so considered here.

The whole doctrine is so fully laid down and declared in the

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case of *Warren & Dalton v. Lusk*, that I might have contented myself by simply referring to the decision in that case, and affirmed this judgment. The judgment of the court below is affirmed, Judge Scott concurring.

HARNESS, Appellant, vs. GREEN'S ADMINISTRATOR, Respondent.

1. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents.
2. Under our administration law classifying demands, (R. C. 1845, sec. 1, art. 4,) only judgments of our own state can be placed in the fourth class. Judgments of sister states have no preference over simple contract debts.

Appeal from Daviess Circuit Court.

The facts are sufficiently stated in the opinion of the court.

Gardenhire, for appellant. 1. The word "judgments" in the fourth subdivision of the first section of the fourth article of the administration law, includes the judgments of sister states, as well as our own. 2. By the constitution of the United States, the citizens of each state are entitled to all privileges and immunities of the citizens of the several states. Under this clause, can a domestic judgment be put in the fourth class and a judgment of a sister state in the fifth? (See 3 Story's Comm. on Cons. 675.)

A. A. King, for respondent.

SCOTT, Judge, delivered the opinion of the court.

Harness, the appellant, obtained a judgment against J. W. Green, the intestate of the defendant, in the state of Virginia. A suit was afterwards brought on that judgment in Daviess county, in this state, against the administrator of Green, and there was a recovery had. This judgment was by the Circuit Court of Daviess county placed in the fifth class of demands against the estate of Green. This judgment was

appealed from, on the ground that the judgment rendered here was founded on the judgment rendered against Green in his life-time in the state of Virginia, which, under the constitution and laws of the United States, was entitled to be placed in the same class as domestic judgments.

1. The precise point involved in this case, so far as it is affected by the constitution and laws of the United States, was settled by the Supreme Court of the United States, in the case of *McElmoyle v. Cohen*, (13 Peters, 312,) in which it was held that, in the payment of the debts of a testator or intestate in one state, the judgment of another state, whatever may have been the subject matter of the suit, cannot be put upon the footing of judgments rendered in the state; and it can only rank as a simple contract debt, in the appropriation of assets of the estate of a deceased person to the payment of debts. The cases of *Ten Eyck v. Ten Eyck*, decided in Georgia, and *Cameron v. Wurtz*, (4 McCord, 278,) in which it was held that, in the administration of insolvent's estates, judgments obtained in other states take no precedence of simple contract debts, were cited with approbation. But the court says that, if the question was an original one, without the cases referred to, they would come to the same conclusion; that the law of congress, of 26th May, 1790, made the judgment a debt of record, not examinable upon its merits, but it does not give to it, in another state, the efficacy of the judgment upon property or upon persons, to be enforced by execution; that, to have the force of a judgment in another state, it must be made a judgment, and can only be executed in the latter, as its laws may permit.

2. There is nothing in the words of our statute which would extend it to judgments rendered in our sister states, more than to the judgments rendered in any foreign country. Under the words of the law, no one would pretend that a judgment rendered in Great Britain was contemplated. Now the idea that judgments rendered in our sister states were comprehended by the words of the statute, originated in the belief that, by the

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constitution and laws of the United States, an efficacy was imparted to them which required that they should be classed with domestic judgments. But as we have seen the light in which a judgment of one state is regarded in another by the courts of the United States, in the administration of insolvent estates, there can be no foundation for the pretension set up for the judgment rendered in Virginia. When laws speak of things, unless the words show otherwise, they are presumed only to have reference to those things which are within the limits of the territory in which the laws have effect.

In the case of *Brengle v. McClellan*, (7 Gill & John. 534,) it was held that a judgment of the state of Pennsylvania, conclusive between the parties in that state, and having a priority over bonds, single bills, and simple contract debts in that state, as against the assets of the defendant in the hands of his executor, is considered only as a simple contract debt, in the distribution of assets in the state of Maryland.

Judge Ryland concurring, judgment affirmed.

GARNER, Appellant, vs. BEAUCHAMP, Respondent.

1. Judgment affirmed because no question of law was ruled below against the appellant.

Appeal from Oregon Circuit Court.

Action to recover damages for the breach of an alleged contract. The record shows that the plaintiff offered evidence tending to prove the contract and the breach of it, and no evidence appears to have been offered by defendant. No exception was taken to the admission or rejection of testimony. Two instructions asked by plaintiff were given, and one asked by defendant was refused. The jury found a verdict for the defendant.

No appearance for appellant.

Woodside, for respondent.

SCOTT, Judge. This was an action begun in a justice's court, and was taken by appeal to the Circuit Court, where, on a trial *de novo*, there was a judgment for the defendant.

As none of the instructions asked by the defendant were given, and as all those asked by the plaintiff were given, there is no ground on which he can seek a reversal of the judgment.

Judge Ryland concurring, the judgment will be affirmed.

'POWERS, Defendant in Error, *vs.* HEATH'S ADMINISTRATOR
et al., Plaintiffs in Error.

1. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party.

Error to Morgan Circuit Court.

The facts sufficiently appear in the opinion of the court.

P. R. & E. R. Hayden and J. W. Morrow, for plaintiff in error, among others, made the following points: 1. Powers having failed to set up the rescision of the contract as a defence at law is forever precluded. (*Cadwalader v. Atchison*, 1 Mo. Rep. 470. 2 Mo. Rep. 77. 3 Mo. Rep. 321.) 2. Browder's intestate being a *bona fide* assignee of the note sued upon, could not be affected by the decree rescinding the contract, being no party to that proceeding. 3. The statutes of this state forbid an injunction in this case. (R. C. 1845, p. 314, §9, p. 582.)

Wright and Gardenhire, for defendant in error, among others, made the following points: 1. The nature of respondent's defence was not changed by the assignment. He can make the same defence to the judgment as he could have made had it been rendered in favor of the original holder of the note. (R. C. 1845, p. 191, §4.) This section was intended to embrace equitable as well as legal defences, (*Barton's Adm'r v. Rector*, 7 Mo. Rep. 524,) and is equally available against

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the judgment, as against the note on which it was rendered. *Ib.* 2. The respondent is not precluded by his failure to make the defence at law. (1 Story's Eq. p. 81, §64 *i.* 7 Ves. 18, 19. 9 Ves. 467-8-9. 3 Bibb, 255-6. 7 Mo. Rep. 524. 11 Mo. Rep. 433. *West v. Wayne*, 3 Mo. Rep. 13. 9 Mo. Rep. 273-4. *Ib.* 336. 8 Mo. Rep. 625.)

SCOTT, Judge, delivered the opinion of the court.

This was originally a proceeding to obtain an injunction restraining the enforcement of a judgment obtained on a note, given in part payment for a tract of land conveyed to Powers, the defendant in error, on the ground of a failure of the consideration. Browder, the plaintiff in error, held the note as the representative of Jonas Heath, deceased, to whom it had been assigned. While this suit was pending, Powers, the defendant in error, who was plaintiff in the proceeding for an injunction, filed an amended petition, in which he sets up as a ground of relief against the judgment at law, the fact that the note, the foundation of the judgment, was given in part payment of the purchase money for parcels of land, the contract for the sale of which had been entirely rescinded by a judicial decree. This amended petition does not show that the suit which resulted in the decree for the rescision of the contract, had been instituted before the note giving rise to this controversy had been assigned to Browder's intestate, who was no party to that proceeding.

It appears that the original ground for the injunction was waived by the amended petition. It was so regarded by the parties, as the record and the finding of the court show that, on the trial below, the matter set up in the amended petition was alone investigated. As the amended petition does not allege that the contract was rescinded before the note was assigned, and as the fact is not so found by the court, Powers does not show himself entitled to the relief he seeks, unless the law is, that the rescision of the contract affected a prior assignee of the note; for, as he is asking relief from a judgment at law, he must show affirmatively the existence of the facts which en-

title him to that relief. The burden is on him to prove that the consideration of the note was destroyed by the decree, and that it had not been assigned at the time of the institution of the suit, which resulted in a rescission of the contract. As this fact was not shown, the only question presented by the record for our consideration is, whether a prior assignee of a note which is a part of the consideration of a contract of sale, which has been entirely rescinded by a proceeding to which he was no party, is affected by such proceeding.

1. We confess we can see no principle by which an assignee of a note could be affected by a decree in a suit to which he was no party. There is nothing, in our view, which relieves this case from the operation of the general rule which protects the rights of every individual against proceedings to which he is no party. The decree rescinding the contract was a nullity as to the assignee of the note. Before he could be affected, the merits of the controversy in which the decree was rendered, should have been reinvestigated in a proceeding to which he was made a party.

The case of *Heath v. Powers*, (9 Mo. Rep. 774,) (the syllabus of which fails to state the point in the cause,) goes on the idea that an assignee, in cases like the present, is not bound by proceedings to which he is no party. The note here was assigned in writing, and the statute in force at the date of the assignment made such an assignment a transfer of the legal interest in the note, and enabled the assignee to sue in his own name. This placed him in a stronger position than was occupied by the plaintiffs in the cases of *Dawson v. Coles*, (16 John. R. 51,) and *Burton v. Dees*, (4 Yerg.) in which it was held that a mere equitable assignee was not bound by a judgment in a suit on a note in the name of the assignor, after an assignment made prior to the institution of the suit. (3 Cow. & Hill's notes, 975.)

Judge Ryland concurring, the judgment will be reversed, and the bill dismissed.

Pearson v. Inlow.

PEARSON, Respondent, vs. INLOW, Appellant.

1. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff, the recovery being limited to the damages for the mere taking of the timber.

Appeal from Audrain Circuit Court.

Action originally commenced before a justice of the peace.
The complaint filed was as follows :

“ Abraham Inlow,

“ To John A. Pearson, Dr.

“ To trespass and damage on my land ; to cutting and hauling off timber, without the leave or consent of said Pearson, to the amount of twenty dollars damage.”

At the trial, it appeared that Inlow bought of Pearson part of a tract of land owned by him, and before the purchase, they went together to ascertain where the line would run. They undertook to follow it by sighting from tree to tree. As they passed along, Pearson pointed out a large white oak, and remarked that the line must run near that tree, but did not undertake to designate the line precisely. There was evidence tending to show that the timber cut or caused to be cut by defendant would have been on the land bought by him, if the line had run as pointed out by plaintiff ; but in fact was on plaintiff's land. The court gave the following instruction :

“ If the jury find from the evidence, that the defendant cut or caused to be cut or carried away any timber from the land of the plaintiff, they will find such damages as he may have sustained by reason thereof.”

The court was asked to instruct the jury to find for the defendant, if they believed he had cause to believe from the representations of Pearson that the land from which the timber

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was cut or hauled off, was his own land bought of Pearson. This instruction was refused, and the defendant excepted.

The plaintiff had a verdict for ten dollars, and the defendant appealed.

Ansell, for appellant.

Guitar, for respondent.

SCOTT, Judge, delivered the opinion of the court.

1. If the plaintiff, through mistake, led the defendant into error, as to the ownership of the timber, such mistake would not have the effect of vesting the property of the timber in the defendant. The defendant would still be liable to the plaintiff for the value of the trees. As this action was commenced before a justice of the peace, and the complaint was in the form of an account, and as the recovery was limited by the instruction given for the plaintiff to the amount of damages arising from the mere taking off the timber, we see no reason for disturbing the judgment, or for turning around the plaintiff to another action.

The facts stated in the defendant's instruction were evidence in mitigation of damages, or if they justified the trespass, would not have the effect of depriving the plaintiff of his property. This court will not disturb verdicts on the ground that they are against the weight of evidence. Judge Ryland concurring, the judgment will be affirmed.

DUMEY, Appellant, *vs.* SCHOEFFLER *et al.*, Respondents.

1. The supreme court will not disturb a non-suit voluntarily taken by a plaintiff, upon the overruling of a motion to strike out a part of the defendant's answer. (*Schulter v. Bockwinkle*, 19 Mo. Rep. 647, affirmed.)

Appeal from Chariton Circuit Court.

This was a petition by Dumey against Schoeffler and wife to recover possession of certain real and personal estate. The petition stated that, by the last will of Frederick Heneger, his

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widow became entitled to the property in question during her life or widowhood, and that she had since intermarried with the defendant, Schoeffler, whereby the plaintiff and Sarah Dumey, an infant, (who was made a defendant, her guardian refusing to join as plaintiff,) by the terms of the will became immediately entitled to the possession of the property.

Schoeffler and wife answered, setting up, among other things, that so much of the will as required her to surrender the property upon her marriage was void.

A motion to strike out this portion of the answer was filed and overruled, whereupon the plaintiff voluntarily submitted to a non-suit, and appealed to this court.

Clark, for appellant.

J. Davis, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This case presents the point of a petitioner taking voluntarily a non-suit, because the court below refused to strike out a part of the defendant's answer. There was no compulsion by the court for this plaintiff to take this non-suit.

The case should have gone on, and the points involved have been settled by the court upon proper instructions, so that there might have been a judgment for one or the other parties upon the matters in the answer and petition, which remained after the petitioner's motion to strike out a part of the answer had been overruled.

In cases where the giving or refusing to give instructions may affect the party's right to maintain his action, there the ruling of the court may force a party to take a non-suit; in such cases, this court will look into the judgment and decision of the lower court thus forcing the non-suit on the petitioner, and will affirm or reverse, as the law may be.

1. In the case of *Schuller's Adm'r v. Bockwinkle's Adm'r*, (19 Mo. Rep. 647,) this court held, that we would entertain jurisdiction in cases where the courts below have, upon the trial of causes, decided questions which covered the plaintiff's case,

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and obliged him to submit to a non-suit. But where parties voluntarily suffer non-suits, we do not interfere. If it was allowed to plaintiffs to take non-suits on every motion they might make, and which the court might overrule, and then bring the case here to test the correctness of the decision upon the motion, this court would be filled with cases in all different stages of progress, and every question of practice might be brought here, to be settled before the merits of the case were reached. Although the court refused to give judgment on the answer on motion made by the plaintiff, there was still to be a hearing of the cause, and, until that hearing, there could be no decision, by which the plaintiff was obliged to take a non-suit." The case now before us comes fully within the principles of the case cited from 19 Mo. Rep. Here, a motion was made by plaintiff to strike out a part of the defendant's answer. This motion was overruled, and thereupon the plaintiff takes voluntarily a non-suit. He was not compelled to this course: he could have had the decision of the court upon the legal effect of that part of the answer, upon asking proper instructions. His case was not decided by the court below upon this motion to strike out, and we will not suffer the parties to come here upon every motion which is overruled or sustained, followed by a voluntary non-suit.

This court formerly held, under the old practice, that a writ of error would not lie on the judgment of a court overruling a demurrer; a final judgment on the demurrer must also be rendered. (*Palmer v. Cram*, 8 Mo. Rep. 619.) Upon the case, then, as it appears the party was not forced to take this non-suit, as the action of the court below did not cover his whole case, we must let the judgment below stand. We say nothing about the merits of the matter in controversy—nothing about the correctness of the action of the court below in refusing to strike out that part of the answer. The plaintiff went out of court, of his own accord, and we let him take his own course. Judgment affirmed; Judge Scott concurring.

Tindle v. Nichols.

TINDLE & WIFE, Plaintiffs in Error, vs. NICHOLS, Defendant
in Error.

1. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury.

Error to Cedar Circuit Court.

The facts are sufficiently stated in the opinion of the court.

F. P. Wright, for plaintiff in error. The court erred in requiring the grand jurors to testify and disclose the evidence given by Mrs. Tindle before the grand jury. (Art. 3, secs. 15 and 17, tit. Practice and Proceedings in Criminal Cases, R. C. 1845. 1 Greenl. Ev. §252. 13 Maine, 82. 2 Halstead, 347. 1 Chitty's Crim. Law, 316. 2 Hale, 161. Roscoe's Crim. Ev. 149.)

W. H. Otter, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The plaintiffs bring their action for slanderous words spoken by defendant of and concerning the wife of the plaintiff. The defendant justifies the speaking of the words by alleging their truth; that the plaintiff's wife, as a witness before the grand jury, did swear falsely in a certain matter then under the investigation of the grand jury of Cedar county. There is no objection to the plaintiff's petition or to the defendant's answer.

On the trial of the case, the defendant, in order to prove his answer, introduced several of the grand jurors as witnesses. These witnesses were called on to state what the plaintiff's wife had testified to before the grand jury in relation to the subject matter mentioned in the defendant's answer.

The plaintiffs' counsel objected to these grand jurors testifying. The grand jurors themselves also claimed to be excused

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and exempted from detailing the facts stated before them in this matter, but the court overruled the objections and required the witnesses to testify, in regard to what the plaintiff's wife had sworn to as a witness before them, as members of the grand jury. To this, the plaintiffs excepted, and file their bill of exceptions.

The jury found a verdict for the defendant. Plaintiffs moved to set aside the verdict and for a new trial, which motion being overruled, exceptions were taken, and the plaintiffs bring the case here by writ of error.

1. The only question for our consideration arises upon the ruling of the court below, in regard to the admissibility of the grand jurors as witnesses. This is a grave question, and it has had the serious consideration of the court; and we are of opinion that these witnesses should not have been required or permitted to disclose the evidence given before them as grand jurors; that the court below erred in this matter, and its judgment must be reversed.

The fifteenth section of the third article of our statute concerning practice and proceedings in criminal cases, and the seventeenth section of the same, have an important relation to this subject, and I will here notice these provisions.

The fifteenth section is as follows: "Members of the grand jury may be required by any court to testify whether the testimony of a witness, examined before such jury, is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person, for perjury, or upon his trial for such an offence." The seventeenth section: "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto," &c.

Thus stands the statute law. In what cases, then, can a grand juror be lawfully required to testify as a witness in relation thereto? Such as are embraced in the fifteenth section

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cited above, and such only. This fifteenth section specifies these cases, and the bare specification excludes all other cases not enumerated. These cases are, first, "Whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such court; and, secondly, may be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for perjury."

These are the cases where a grand juror may be lawfully required to testify in relation thereto. A grand juror hears a witness swear in court upon the trial of an indictment which was found by the grand jury of which the said grand juror was a member; he remembers what that witness swore before his body upon the finding of the indictment, he hears the witness swear afterwards before the court on the same subject matter; this grand juror may, under such circumstances, be called on to testify whether the witness swears consistently or not.

Should perjury be charged against such person, the grand juror may be called on to testify in relation to the charge or complaint. Should an indictment be found against such person for perjury, then on the trial thereof, the grand juror may be required to testify in relation thereto; and these are the only cases in which grand jurors can be made to testify in relation thereto.

Let us examine this matter a little. The grand jury is a secret tribunal. No person but the members are present when they consider and cast their votes, or express their opinions in relation to the finding or not of the bill of indictment—"a true bill." But the circuit attorney may be present when the witness is examined; he remembers the examination; he takes an active part in bringing forth the testimony. The circuit attorney also, upon the trial of the indictment, knows what the witnesses will prove, for he heard them swear before. Should a witness swear differently—should a witness contradict his former testimony, the circuit attorney may think it his duty to

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proceed against this witness for perjury; here, a grand juror becomes a competent witness. The defendant may suspect the truth of the witness; he may call on a grand juror, and examine him as a witness as to the consistency or prevarication of the suspected witness. This is allowed for the reason of the secrecy of the grand jury. Witnesses, although they know the grand jury is a secret inquest, yet may know that, if they swear falsely against any person before this secret body, they are liable to be exposed and prosecuted for the crime of perjury. Witnesses also know that they are protected and kept concealed by this inquest; they are not, nor is their testimony made public, unless in the manner pointed out by law. "The grand jury shall not disclose the name of any witness," &c. Permit any party in any court, in any controversy, to call a grand juror as a witness and examine him as to what he heard a witness swear before his body, and you destroy at once one of the great, inherent, essential qualities of the grand juror. If you can examine a grand juror as a witness in an action of slander, so you may in any action; break down this guard in one instance, and what will hinder it from being done in any or all others. These provisions of our statute concerning secrecy of grand jurors have their origin in the common law. Any person who may be present on the occasion is bound not to disclose what may transpire, and the jurors themselves are, by the terms of their oath, laid under the same obligation; and if they transgress it, they are finable. Formerly indeed, they became accessories to the offence of felony; and if treason, principals; and, at this day, it is, in general, a high misprision. But where a witness, examined on the trial, swears directly the reverse of the evidence given before the grand jury, they are at liberty to state this circumstance to the judge, who may direct him to be prosecuted for perjury on the testimony of the grand inquest. (1 Chitty's Criminal Law, 317.) From all that is said on this subject in the books, it may be laid down that grand jurors are not permitted or required to testify to what has been given in evidence before them, unless it may be in the cases

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similar to those pointed out in the provisions of our statute above cited. Applying this doctrine to the acts of the Circuit Court in this case, and it will be seen that his judgment cannot stand. I do not find any error in the refusal to give the second instruction asked for by the plaintiff.

Upon the view here taken of the secrecy of the grand jurors, and the duty of the courts not to interfere with that secrecy, unless in the cases pointed out by the statute, this judgment must be reversed, and the case remanded; Judge Scott concurring.

PERSELLY, Appellant, vs. BACON, Respondent.

1. The words "you swore to a lie before the grand jury" held actionable.

Appeal from Polk Circuit Court.

Action for slander. The petition stated in substance that the defendant charged the plaintiff with "swearing to a lie before the grand jury," and that this charge was made in allusion to the testimony given by plaintiff before the grand jury while investigating a charge of open lewdness and lascivious behavior against a slave. A demurrer to the petition was sustained by the Circuit Court.

F. P. Wright, for appellant. 1. The words are actionable in themselves. They import a charge of false swearing in a judicial proceeding, and before a tribunal competent to administer an oath. (7 B. Monroe, 475. 2 Conn. Rep. 40. 2 Serg. & Raw. 469.) If the words are actionable *per se*, the defendant is liable, even though they were used in reference to an extra-judicial oath. (3 Penn. & Watts, 103. 10 Serg. & Raw. 47.) 2. But the grand jury had authority to administer the oath. Even if they cannot indict a slave for a misdemeanor, it is their duty to inquire into all violations of law in their

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county and make presentments. (See R. C. 1825, tit. Slaves, §36, 37. *Ward v. The State*, 2 Mo. Rep.)

W. H. Otter and *S. A. Bennett*, for respondent. The words alleged to have been used by defendant do not necessarily imply a charge of perjury, and the *colloquium*, instead of showing that they did, shows that they did not amount to such a charge. Grand juries have no cognizance of misdemeanors when committed by slaves, and so the oath under which plaintiff was charged to have sworn falsely, was one which the grand jury was not authorized to administer. (R. C. 1845, tit. Crimes and Punishments, art. 9, secs. 27, 28; tit. Practice and Proceedings in Criminal Cases, art. 3, sec. 4. *Mahan v. Berry*, 5 Mo. Rep. 21. 20 J. R. 344, and cases cited. 2 J. R. 10.

RYLAND, Judge, delivered the opinion of the court.

This is an action of slander. The words charged as spoken by the defendant are, in part, as follows: "You, (said plaintiff meaning,) swore a lie before the grand jury. "You, (plaintiff meaning,) swore a lie before the grand jury, and I can prove it." "He, (said plaintiff meaning,) swore a lie before the grand jury, and I can prove it." The defendant demurred to the petition; the court sustained the demurrer, and rendered judgment for the defendant.

The plaintiff brings the case here by writ of error; and the only question before us is, whether the words in the petition are actionable of themselves or not. I have disregarded all the inducement in the petition, about there being a certain matter depending before the grand jury, of and concerning a certain charge against a certain negro slave; whether said slave had been guilty of open, gross lewdness and lascivious behavior; and that the plaintiff was sworn as a witness before said grand jury concerning said offence, against said negro slave, and had given evidence before said grand jury on said matter; and that said offence was properly cognizable before said grand jury, and that these words were spoken of and concerning the plain-

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tiff, and of his being a witness before said grand jury, and of and concerning his evidence given before said grand jury, in the prosecution of said offence against said negro slave. For reasons which I shall hereafter mention, I put out of the case this colloquium—reject it as surplusage; it does no good, and should do no harm, and I will notice only the charge “of swearing to a lie before the grand jury.”

By our statute law, the foreman of a grand jury has the right and authority to swear witnesses, and the grand jury the right to examine witnesses under oath. The oath of a witness then, before a grand jury, is a lawful oath. “Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter, upon any oath or affirmation, or declaration, legally administered in any cause, matter or proceeding before any court, tribunal or public body or officer, shall be deemed guilty of perjury.” (R. C. 1845, tit. Crimes and Punishments, art. 5, sec. 1, p. 377.)

The grand jury is a public body, empowered by law to administer oaths to witnesses, and then empowered by law to examine witnesses and to require witnesses to testify before them. To charge a person with swearing falsely before a grand jury is then, in our opinion, actionable, without laying special damages. The words in this declaration we consider actionable in themselves. “You,” meaning the plaintiff, “swore a lie before the grand jury.” “He,” meaning the plaintiff, “swore a lie before the grand jury, and I can prove it.” Chief Justice Swift, in *Chapman v. Gillet*, (2 Conn. Rep. 45,) said: “It is a first principle, founded in the nature and fitness of things, that swearing falsely, when under an oath lawfully administered, is a crime. At first, perjury was confined to false swearing in a court of record; it was then extended to courts not of record.” Smith, J., in the same case, said: “Upon principles of common law, perjury may be committed before any tribunal in which an oath may be lawfully administered; for, where the law will sanction an oath, it will not refuse its aid to punish a wilful and corrupt violation of it. To constitute

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perjury, there must be the violation of a lawful oath, taken before a competent jurisdiction. If the oath may not be administered, it is a transaction which no court can recognize; but if the oath may lawfully be given, the law will regard it, and not suffer it to be violated with impunity." "An oath," says Lord Coke, (3 Inst. 165,) "is an affirmation or denial of any thing lawful and honest, before one or more, that have the authority to give the same for the advancement of truth and right. The same cannot be administered to any, unless the same be allowed by the common law, or by some act of parliament." "The law takes no notice of any perjury," says Blackstone, "but such as is committed in some court of justice having power to administer an oath, or before some magistrate or proper officer invested with a similar authority. It esteems all other oaths unnecessary at least, and therefore will not punish the breach of them." (4 Black. Com. 137.) Hawkins observes: "that all such false oaths as are taken before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, or that are taken before persons authorized by the King to examine witnesses in relation to any matter whatsoever, wherein his honor or interest are concerned, are also punishable as perjuries. Therefore, it hath been holden that, not only such persons are indictable for perjury who take a false oath in a court of record, but also those who forswear themselves in a matter judicially depending before any court of equity, spiritual court, or any other lawful court." (1 Haw. Pleas. Cro. 172, 173.) "The principle to be extracted," (says Hosmer, J., in the same case from Conn. Rep., (*Chapman v. Gillet*), after citing the authorities which I have quoted above,) "from the authorities cited, is obviously this; that all oaths taken by witnesses before acknowledged authority, which are necessary, and concern the honor or interest of the state, the law recognizes, and if violated, will punish. This is the true spirit of the common law, founded, as it is, on private justice and public convenience." In the case of *Ramey v. Thornberry*, reported in 7 B. Monroe's Rep. 475,

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the Court of Appeals of Kentucky held that the words, "Ramey swore a lie in the Pike Circuit Court, on the trial of the Commonwealth against Davidson Mays," were actionable in themselves. The court observed: "To charge a person, in general terms, with having sworn a lie, or having sworn falsely, is certainly not actionable. But here, the words very clearly import a charge of false swearing in a judicial proceeding, and before a tribunal competent to administer an oath."

Apply this doctrine to the case at bar, and it will be seen that the words here spoken are equally actionable of themselves. It was before a grand jury; a competent body to administer oaths, and before which, a false oath may be perjury by the statute law. In *Ceely v. Hoskins*, (Croke Charles, 509,) the words were: "Thou art forsworn in a court of record, and that I will prove." After verdict for the plaintiff, the judgment was arrested, the Common Pleas holding the words not actionable. But the King's Bench reversed the judgment of the Common Pleas, and the plaintiff recovered. The court held, clearly, that the action well lay; "and it shall be intended that he spake these words maliciously, accusing him of perjury, and for a false oath, taken judicially, upon judicial proceedings, in a court of record, and shall be understood according to the common speech and usual intendment."

In *Fowle v. Robbins*, the words were: "You swore false at the trial of your brother, John." The declaration charged the words, without any averment that the words were spoken concerning the testimony given by plaintiff at the trial referred to. These words were held actionable; and the motion to arrest was overruled. (12 Mass. 498.) In this case, Jackson, J., said: "It is not necessary that the defendant should have used technical language, and have stated his charges against the plaintiff with the accuracy that would be required in an indictment. If the words can be understood only as conveying a criminal charge, and would be so understood by those who heard them, the court cannot undertake to say that they are not actionable, although the defendant may have misappre-

hended the nature of the crime with which he has charged the plaintiff, or may have threatened him with a punishment, which the law does not inflict for such an offence. As words gradually acquire a new meaning, or as new words come into general use, the court and jury cannot profess to be ignorant of such changes; and thus there are, perhaps, many words that would now be deemed actionable, as importing a slanderous charge, which would not have been so considered in the time of Croke. A reference to ancient cases, therefore, although useful to ascertain the law, will not serve to fix conclusively the construction of the words, nor the sense in which they were uttered by the defendant, and understood by the hearers. * * * The word, "forsworn," if not further explained at the time, might not necessarily convey the meaning of perjury; but, "forsworn at the trial of A. B." would convey no other meaning to any man in the community, and the court is bound to understand the words according to their general use and acceptance."

To say, "Thou wert forsworn at such a trial," with reference to a trial where the offence of perjury might have been committed, is actionable.

Where reference is made to a particular court, the imputation is actionable, if perjury could have been committed there. In such a case, however, it is incumbent on the plaintiff to show that the perjury could have been committed. To say, "Thou wert forsworn before my Lord Chief Justice in evidence," is actionable. (Starkie on Slander, p. 51-2-3.) The defendant said: "Thou art a forsworn knave." The plaintiff asked, "Where?" The defendant replied, "In the Ilston Court." These words were held actionable—the court alluded to being a Court Leet, where the offence of perjury might have been committed. (*Marshall v. Dean*, Croke Eliz. 720.) All the court here held, (says the reporter,) that the action well lay: "For this action is given by reason of the discredit of such words amongst the neighbors."

There cannot be a doubt of the fact, that perjury may, by our law, be committed by a witness before the grand jury. Then,

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applying the principles extracted from the various authorities cited, and it becomes manifest that the words charged in this case are actionable *per se*.

A grand jury is a lawful body, empowered to hear and investigate charges of a criminal nature against persons within their proper county. A grand jury has the power to examine witnesses; to compel witnesses to testify before them. The foreman of the grand jury can administer the oath to a witness. The statute law makes false swearing before such a body perjury. Then, to charge that a person swore a lie before the grand jury, is actionable, without any inducement. Every person in the community, who hears such a charge against another person, understands, at once, that the person accused has been charged with the crime of perjury. No innuendo is necessary to explain such a charge; it is understood in the community, and is actionable, because of the "discredit of such words amongst the neighbors." The defamation of character is one of the true grounds on which this action ought always to have been put, and not the liability to a prosecution for the charge or alleged imputation alone be considered the real ground. Who now would pretend to adhere to the old doctrine of *Snag v. Gee*, (4 Coke, 16.) To accuse a man of murder, is not actionable, if the man supposed to have been murdered is alive. If the charge is beyond controversy false, it is not actionable; but if the alleged murdered man happen to be dead, or absent, so that he cannot be produced or found, then the charge is a slander, and actionable; because then the accused may be prosecuted for the murder—placing out of the question every injury to character, and sustaining the action alone on the ground of a liability to a criminal proceeding. In *Smith v. Williams*, (Carth. Rep. 247,) the slanderous words were: "He confessed that he was the man who robbed the Hockley butcher." The counsel moved in arrest of judgment, that it did not appear that there was any Hockley butcher, and cited *Snag v. Gee*, that action does not lie for these words: "Thou hast killed or murdered A. B.," without averment that

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he is dead. But Holt, Chief Justice, scouted at this, and directed judgment, exclaiming, "the fault is the greater, and it is a double crime." (See *Eckhart v. Wilson*, 10 Serg. & Rawle, 50.) In *Rivers v. Lile*, upon error from the Common Pleas, it was held actionable to say of the plaintiff, "You did shut up my sister and murder her, and I will prove it," notwithstanding a long string of old cases were cited to the contrary, and the judgment was affirmed.

Now I will notice why I rejected the colloquium, or inducement in this action. These words being actionable in themselves, did not need a colloquium. None was necessary, and the charge being made without the defendant using the reference to the particular matter before the grand jury himself, the slanderous words stand alone, not interwoven with the prosecution against the negro before the grand jury. All that is said, then, about the pendency of this matter about the negro, may be rejected as surplusage. In the language of Chief Justice Gibson: "Words which impute a crime are actionable, not more because they expose the party charged to the danger of being convicted, than of being prosecuted, which, even to the innocent, is a grievance; and in every instance, where the meaning of what would otherwise have been an unambiguous accusation, has been controlled by circumstances which showed it to be groundless, and thus rendered it harmless; the controlling circumstances were so mingled with the accusation by the accuser himself, as to make the poison carry its antidote along with it. The decisions by which the doctrine of repugnancy was formerly carried to an extravagant length, have ceased to be precedents, and the rule now seems to be that, if the charge be not palpably unfounded on the face of it, the risk of a prosecution which it induces shall be compensated in damages. But it has been said that, whatever may be the right of action in the abstract, yet it appears by the plaintiff's own showing in the pleadings, that the oath to which the publication had reference, was not the subject of perjury. Were it, indeed, laid that the defendant himself had so described it in the offensive publica-

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tion, the plaintiff would have shown himself to be without a cause of action. He has, however, set out the publication exactly as it was made, having stated as matter of inducement, the nature of the affidavit to which it relates ; but this matter of inducement may be struck out of the declaration, without prejudice to the cause of action, which is fully stated without it." (*Deford v. Miller*, 3 Penrose & Watts' Penn. Rep. 103.) Applying the principle of this case, and I fully concur in its correctness, and all that part of the plaintiff's petition which is laid as inducement to the speaking of the slanderous words may be stricken out without prejudice to the petition. Upon the case, then, when we compare it with the authorities and the general principles governing such actions, we are satisfied that, to charge a person with "swearing to a lie before the grand jury," is actionable in itself, and needs no colloquium or inducement. Striking out, therefore, the inducement here, there is a plain charge against the plaintiff, actionable in itself, for which he has a right to ask for damages. The demurrer, therefore, ought to have been overruled. The judgment below is reversed, and the cause remanded ; Judge Scott concurring.

THE STATE, Appellant, *vs.* BAKER, Respondent.

1. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment ; nor would they, it seems, be permitted to state the fact that twelve did not concur.

Appeal from St. Clair Circuit Court.

The case is fully stated in the opinion of Judge Ryland.

Gardenhire, (attorney general,) for the State. The action of the court below was in direct violation of the statute, which expressly provides that no member of a grand jury shall

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be obliged or *allowed* to testify or declare in what manner he or any other member of the grand jury voted on any question before them. It is in vain to say, as was said in Low's case, (4 Greenl. 440,) that the *fact* whether twelve or more concurred in the bill is not a secret. If one or more grand jurors can be called to contradict the certificate of the foreman, the policy of the statute is gone. How can they be contradicted if they swear falsely, without giving the names of the members who voted for or against the bill? Shall one member of a grand jury swear that twelve did not concur, and turn a prisoner loose, without further question? The law as plainly requires twelve jurors to convict, as to find an indictment. If the certificate of the foreman of the grand jury can be impeached by the oaths of his fellows, why may not the final verdict be impeached in the same way? There is a much better reason for it. The indictment is preliminary, the verdict is final. Yet it is well settled that traverse jurors cannot impeach their verdict. (1 Mass. 543. 4 Mass. 399. 4 Johns. 487.)

F. P. Wright and *W. H. Otter*, for respondent. Under the constitution, defendant could not be convicted of the offence charged, otherwise than by indictment, which is an accusation presented on oath by a grand jury, twelve at least concurring. (2 Hale's P. C. 161. 2 N. C. 188. 2 Black. Rep. 718. 3 Bacon's Ab. Indictment. State Cons. art. 13, §8, 14. R. C. 1845, p. 866, §19. 2 Gallison, 366.) The law says that no citizen can be deprived of life, unless by a concurrence of twenty-four of his peers; but if he is deprived of the means of asserting this boasted right, it is a mere mockery. The law excludes all persons from the grand jury room, except the grand jurors themselves, when they vote upon a bill, and consequently they alone can be witnesses.

The fact whether twelve or more concurred is not a secret. It is a result always made public by the endorsement "a true bill" or "not a true bill" upon the indictment. The grand jurors in this case do not declare how any member voted. They

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barely state that they did not vote or concur. (Low's case, 4 Greenleaf's Rep. 440. 9 Mass. 107.)

The endorsement "a true bill" upon an indictment only raises a presumption that twelve of the grand jurors concurred, but this presumption may be rebutted by contrary proof. (1 Greenl. Ev. §252.)

RYLAND, Judge, delivered the opinion of the court.

At the September term, eighteen hundred and fifty-two, of the Circuit Court for Hickory county, John Mullins and Andrew Baker were indicted for the murder of John P. Dorris.

Mullins was not taken. Baker appeared to the indictment, and had the trial continued on his motion until the next term. At the next term, being March term, 1853, Baker applied for and obtained a change of venue—the court directing the case to be sent for trial to the St. Clair Circuit Court, in St. Clair county. At the May term, 1853, of the St. Clair Circuit Court, the case was again continued on defendant's motion, until the next term. At the October term, the case was continued on the motion of the circuit attorney.

At the May term, 1854, the parties appear, and the defendant filed the following motion: "The said defendant, Andrew Baker, comes into court and alleges he ought not to be holden to answer to this indictment, because he says that the said indictment was not found by any twelve of the grand jury, but simply by a majority of the number who constituted the grand jury panel at the court at which said bill purports to be found, and he now moves the court for liberty to prove these facts by Jonas Brown, Samuel Weaver, Jesse Driskill, Hardy C. White, Oliver Poe, members of the grand jury, and who were grand jurors on the panel aforesaid, and their affidavits are here in court." After the filing of this motion, the cause was continued. At the October term, 1854, of St. Clair Circuit Court, the parties again appear, and upon hearing the evidence on said motion to quash the indictment, which evidence will be noticed

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hereafter, the court sustained the motion, and quashed the indictment, and dismissed the proceedings against Baker. The circuit attorney excepted to the various opinions and acts of the court in receiving the affidavits of the grand jurors, and in sustaining the motion to quash the indictment; filed his bill of exceptions, and brings the case here by appeal.

These affidavits are as follows: "Jesse Driskill, sworn for defendant, says he was on a grand jury in Hickory county, when the matter against defendant was investigated; was present when the vote was taken; witness said he did not vote at all." Cross examined: "A vote was taken on the Baker case; I had a knowledge that a bill would be presented, and had been, as I supposed, by the foreman to the court, as I understood; I requested a count, and the reason was, I did not know that twelve had concurred in finding the bill; I had doubts that twelve had concurred; I did not hear any count made; if it was done publicly, I did not hear it; I think none was made; I think Poe, and I think Hardy White, at the time, also made request for a count; the vote was taken by uplifting hands, or making a sign that the jury understood; but one vote was taken, and those that did not vote had no chance to vote at all." Re-examined: "Esquire Walker did the writing and Miles put the vote."

Hardy C. White, sworn for defendant, says: "I was one of the grand jury when the Baker case was investigated in court; (it is admitted that White was on the grand jury;) I was present when the vote was taken on the bill; I had my doubts whether twelve concurred in finding the bill; I did not vote; there was a request to count the vote again; I can't say whether it was Judge Brown or Judge Driskill who requested; if another vote was taken, I do not recollect it; there was a good deal of talk in the room; there was a request to have another vote on it; do not recollect the day on which the vote was taken; I think the vote was taken on the day it was returned into court; Weaver had left before the vote was taken; he was not there; his family was sick, or some one dying." Cross-examined:

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“As well as I recollect, when the vote was taken, they arose to their feet, and sometimes by raising their hands; I did not count all that did or did not vote; the foreman generally counted; Esquire Walker that day was doing the writing; I can't say he counted or not in voting on bills, when twelve raised to their feet, for the bill; there was no further counting of those who did not rise.” Re-examined: “I know of no other juror having been summoned in the place of Weaver.”

Weaver's deposition read: “Was not present when the vote was taken on Baker's bill of indictment;” the circuit attorney waived any objections to Weaver's deposition being read.

Elgin Poe, sworn, says: “Was one of the grand jury; I did not vote on the bill of indictment; I claimed another count of the vote, and named it; the reason was, I did not think twelve concurred in finding it; I thought so from what I saw and heard; I know some did not vote; no second vote was taken; I cannot say how the vote was taken; whether by rising up, or lifting up their hands; the vote on this bill was taken but once; I saw some that did not vote.” Cross-examined: “I was busy looking at the law when the vote was taken; I do not know how the vote was taken; I do not recollect about that; it was one of these ways; I do not recollect whether it was the day after or at the time the request was made to have another vote taken; I think we adjourned immediately after the vote was taken; my memory is *dim* upon this subject; was present when the bill was presented to the court; made no objection to the bill being handed to the court; I knew that it required twelve to concur to find the bill; I would have objected, if I had known I had the right to do it; I did not know what my duty was in that case.” White recalled: “I knew it took twelve to find a bill and named it to Judge Johnson, who was then judge.” Cross-examined: “This was before the bill was delivered into court and before the grand jury were discharged; I asked Judge Johnson whether it took twelve or not; he said it did; I did not count those who voted for or against the bill; I did not see all who

did or did not vote ; I thought, from the talking in the jury room, that twelve did not concur ; I did not know how to fix it ; it was in the charge of the court that the circuit attorney was the legal adviser of the jury."

James Brown, sworn, says : " I was a member of the grand jury in Hickory ; was present when the vote was taken on the Baker indictment ; I do not know whether twelve concurred in the bill or not ; it was done suddenly ; that is, so that any one could not count it ; it was, all that were in favor of finding the bill to hold up their right hand ; the vote was taken by the foreman suddenly, so no one could count ; I recollect it well ; I requested, by the application of several others, to take another vote ; it was in a few minutes after the vote was taken ; Mr. White first named it to me ; Driskill also wished it taken over again ; I did not vote on the bill ; no second vote was taken on the bill ; it was the first grand jury I was on ; I did not think it was my duty to state it to the court ; but since, I have thought it was." Cross-examined : " Did not count those for or against the bill ; Walker was clerk ; I did not vote for or against."

William Walker, sworn, says : " Was a member of the grand jury ; a vote was taken on the bill against Baker ; I was clerk and pretty much as *foreman* ; Mr. Miles was a very old man ; I put the vote myself ; have a *distinct* recollection myself of it ; I do not recollect whether by rising up, or raising up their right hands ; but, if they raised up their right hands, they were also on their feet ; I counted twelve votes for it ; it was very nigh evening ; I was glad to get through ; we then adjourned ; it was the last thing we done that night ; I believe twelve concurred in finding the bill ; the vote on the bill was the last thing done." Cross-examined : " They were not all on their feet ; they stood on their feet when they voted, and whether they held up their hands at the same time or not, I cannot say ; I knew they all did not vote ; I think the greater part were sitting down when the vote was taken ; I counted just twelve ; those that I did not, sitting ; there was confusion when the vote was put ; I

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knew two did not vote ; I know there were others, from the fact that I only counted twelve ; the count I made twice ; but it was done quick, and I made twelve ; we broke up after the vote in less than a minute ; I made a minute that a bill was found ; no person helped me to keep the minutes ; there was no confusion, because there was not another count ; I heard no request for another count ; there was a good deal of noise or talk, but I heard no request for a re-count." Re-examined : " There was no attempt to reconsider afterwards."

1. The main question for the consideration of this court is, the propriety of the decision of the Circuit Court, in permitting defendant to introduce the evidence of the grand jurors in support of his motion. We consider this act of the Circuit Court to be contrary to the law ; and its judgment in sustaining the defendant's motion is erroneous, and must be reversed. This whole question rests upon our statute law, and I will now proceed to notice its provisions. Not more than eighteen persons are to be summoned as grand jurors, and not less than fifteen sworn to compose the body. It is the duty of the circuit attorney, when required by the grand jury, to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter. The circuit attorney is allowed, at all times, to appear before the grand jury for the purpose of giving information relative to any matter cognizable before them, and be permitted to interrogate witnesses before them, when he or the grand jury shall deem it necessary. " But no such attorney or any other officer or person, except the grand jurors, shall be permitted to be present during the expression of their opinions, or the giving their votes on any matter before them." (Practice and Proceedings in Criminal Cases, art. 3, sec. 7, p. 864, R. C. 1845. Secs. 15 and 16, (same article,) are as follows : " Sec. 15. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court ; and they may also be required to disclose the testimony

given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence."

"Sec. 16. No member of a grand jury shall be obliged or *allowed* to testify or *declare* in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question." "Sec. 19. No indictment can be found without the concurrence of at least twelve grand jurors. When so found, and not otherwise, the foreman of the grand jury shall certify, under his hand, that such indictment is a true bill."

Sec. 20 requires the foreman, when twelve grand jurors do not concur in finding the indictment, to certify, under his hand, that such indictment is not a true bill.

The 21st section declares that, "Indictments found and presentments made by a grand jury shall be presented by their foreman, in their presence, to the court, and shall be there filed, and remain as records of such court."

One clause of the grand juror's oath is as follows: "The counsel of the state, your fellows and your own, you shall well and truly keep secret." This part of the oath has no limitation as to time; it is not to keep secret during the term the grand juror is acting as such, nor during the term of the court; but he is "well and truly to keep secret." The grand juror has an important trust to perform. He is required to make diligent inquiry into the various breaches of the laws of his state, within his county, whose punishment is preceded by indictment. It is often a disagreeable duty; often an irksome task; yet, under his oath, he is bound to perform it. He is a member of a secret inquest, with ample power to ferret out offences: he is charged to assist in doing this. Now, in order to protect him, as well as to secure the punishment of the guilty, strict and rigid secrecy is required and enjoined upon the members of this inquest. The grand juror is expressly exempted from all obligation to testify in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation

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to such question. Nay, the law did not stop at relieving such juror from this obligation, but it expressly prohibits the juror from declaring what opinions were expressed, or how he or any other juror voted on any question before that body. "No member of a grand jury shall be obliged or *allowed* to testify or *declare*," &c. (Sec. 16, of the act above cited.) In this case, the counsel for the prisoner contends, that the grand jurors do not testify how they *voted* on this case, when before them; they only testify that they "*did not vote at all*." This is just as much prohibited as their voting is from being told; for, by allowing each one to say "I did" or "did not vote," the prisoner will easily find out those who voted for the bill and those who did not vote for it. He can put his finger on the grand juror who had firmness to vote on his case, and to vote to find the bill of indictment a true bill; and thus such grand juror is exposed to any and all secret machinations and injuries that the malice of the prisoner or his friends may inflict on the property or person of such grand juror. This is what the law will not allow. Again, permit this conduct or this course of acting before the grand jury to be the subject of proof on a motion to quash the indictment in the Circuit Court, and a corrupt grand juror may withhold his vote on purpose, in order to be used afterwards as a witness. Permit such a course of proceeding as this case presents to us, and the grand jury, instead of being a great preservative power of the peace and well-being and morals of society, will become at once a source of strife, bickering, heart burning and bloodshed among us. Such cannot for a moment be tolerated. Again, permit this course to be allowed, and every inducement for a guilty man and his friends to tamper with the grand juror, is, at once, presented. These grand jurors should have met the reprimand of the court, for their willingness to declare how they voted, or that they did not vote at all, instead of being permitted to file their affidavits. Such a course is not again to be permitted. By our law, when the grand jurors, by their foreman, in presence of the body, return an indictment into court as a true bill, it then becomes a

part of the records of the court, and it should not be subjected to the attacks of parol proof by the members of the very body who, in presence of their foreman, stood by in silence and saw him present it to the court. Incalculable mischief must result to the public at large from such a course of proceeding. The counsel for the prisoner in this case rely upon the case of the Supreme Court of Maine, reported in 4 Greenl. Rep. 439—Low's case. "Grand jurors may be examined as witnesses in court, to the question whether twelve of the panel actually concurred or not in the finding of a bill of indictment, under art. 1, sec. 7, of the constitution of Maine." This case also shows that, if an indictment is found without the concurrence of twelve of the grand jury, this may be shown to the court by motion in writing, in the nature of a plea in abatement, made at the time when the defendant is arraigned." This is the head note of Low's case. I know not whether there be any such prohibitory statute against grand jurors testifying in Maine as we have here. This case may be under some peculiar manner or mode in Maine, under their constitution; yet the judges appear to rely very much on a remark of Judge Sewell, of Massachusetts, in the *Commonwealth v. Smith*, reported in 9 Mass. Rep. 107. Judge Sewell says: "Indictments not found by twelve good and lawful men at least are void and erroneous at common law; and the circumstance that it was found by twelve men, is stated in the caption of every indictment, according to the English forms and practice. But this formality has not been preserved with us, and the omission is not to be objected to in indictments found according to our practice, viz: "The jurors for the commonwealth upon their oath present," &c. An irregularity in this respect, if it should happen, might become a subject of inquiry upon a suggestion to the court; for, under their superintendence, the grand jury is constituted and must be understood to have the legal number of qualified men." The last remark of Judge Sewell is much relied on by the Maine court in their opinions. But at what time is this suggestion to be made? When the grand jury is still under the superintend-

ence of the court, or at what time? Can a different court make the inquiry, as was done in this case now before us? Judge Sewell continues thus: "This being the construction to be given to the record, after an indictment has been received and filed by the court, no averment to the contrary can be permitted as a formal plea. Objections to the personal qualifications of the jurors or the legality of the returns, are to be made before the indictment is found, and may be received from any person who is under a presentment for any crime whatsoever, or from any person present, who may make the suggestion as *amicus curiæ*."

Our law expressly makes all such indictments as are returned into court by the foreman, in the presence of the grand jury, and endorsed by him as "a true bill," and filed by the court, records of the court, and records cannot be averred against. No matter how much I am disposed to respect the learning and practical sound sense of the Maine court, I can never consent to do away with our statutory requisitions, because that court decided a similar case otherwise than I am warranted in doing.

The doctrine now laid down by this court cannot produce harm; for an innocent person will not be hurt by refusing to go behind the indictment and see how it was found, for he can always vindicate himself in a trial upon the merits. This doctrine, too, violates no law, by rendering that public which the law deposits in the breast of a grand juror as an inviolable secret. Our law declares that no exception to a juror, on account of his citizenship, non-residence, state or age, or other legal disability, shall be allowed after the jury are sworn. This extends to criminal as well as civil cases.

The novelty of this proceeding is also against it. For nearly thirty-four years' practice at the bar and on the bench, in this state, I have never seen a similar proceeding. This is the age of progress, however; but let us not overturn the old landmarks, unless we see plainly and beyond all doubt that no harm can arise to the community, and much good may. It is a general principle that no juror, grand or petit, can be heard in

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proof of his own misconduct, or that of his fellows. (See *Dana v. Tucker*, 4 Johns. Rep. 488.) In this case, the Supreme Court of New York stated "that the better opinion is, and such is the rule of this court, that affidavits of jurors are not to be received to impeach a verdict, but they may be admitted in exculpation of the jurors and in support of their verdict." (2 Tenn. 281. 4 Mass. 399.) The defendant's counsel also referred to Hawkins' Pleas of the Crown, (2 vol. p. 307.) Hawkins says: "If it appear by the caption of an indictment, or otherwise, that it was found by less than twelve grand jurors, the proceedings upon it will be erroneous." Now, the English practice was, to insert the names of the grand jurors in the caption of the indictment; if that did not have the requisite number, it was quashed. But Hawkins does not say any thing about proving by the oaths of the grand jury that a less number than twelve concurred in finding the bill of indictment. The court, in Low's case, also referred to this passage in Hawkins. I find Hawkins, to support his text, refers to Clyncard's case, (Croke Eliza. 654.) "Upon examining this case, I find that the indictment appeared to have been found upon the oath of A. B. C. D., and of other lawful men of the county aforesaid, and it did not appear to be upon the oath of *twelve* lawful men," &c.

Here the caption contained the defect. But this authority does not have the least bearing on the question in this case. Hawkin's words, "or otherwise," and the mere expression of a supposition that "it might become a subject of inquiry upon a suggestion to the court," by Judge Sewall, have become the foundation for the opinions in Low's case, under the constitution of Maine, and are now urged here to induce this court to overturn our plain and positive statutory regulations.

There is error in the Circuit Court in permitting the affidavits of the grand jurors, in this case, to be taken and read on the defendant's motion to quash. The judgment below is reversed, and this case is remanded for further proceedings; Judge Scott concurring.

Stone v. Corbett.

STONE *et al.*, Appellants, *vs.* CORBETT, Respondent.

1. Where a cause appealed from a justice of the peace is tried in the circuit court upon an agreed statement of facts, the supreme court will reverse unless the facts support the judgment, although no instructions are asked.
2. The failure of the assignee of a note not negotiable under the statute to bring suit against the maker to the first term of the court, or first law day of the justice having jurisdiction, without excuse, discharges the assignor.
3. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit.
4. Consent of the parties cannot confer jurisdiction.

Appeal from Jackson Circuit Court.

The facts appear in the opinion of the court.

J. B. Hovey, for appellant. 1. The note, at the time it became due, was within a justice's jurisdiction, and the plaintiffs were bound to sue at the first law day after the note became due. (3 Mo. Rep. 202, 451. 10 Mo. Rep. 553.) 2. The facts were agreed upon and in such a case no instructions are necessary. The judgment of the court is the declaration of law upon the special facts or verdict.

J. W. Reid, for respondent. 1. When the note was assigned to Corbett, it was for an amount exclusively within the jurisdiction of the Circuit Court. The mutual obligations of the assignee and assignor arose at the date of the assignment, and could not be altered or modified by any subsequent act of the assignee, unless it was prejudicial to the assignor. The act of accepting a part payment in boots and shoes, and thus bringing the note within a justice's jurisdiction, was not prejudicial to the assignor but for his benefit; and the assignee was only bound to sue at the earliest time at which he could have sued, if he had accepted nothing in payment. 2. As this was an appeal from a justice, the court should have been asked to declare the law by way of instruction. (19 Mo. Rep. 118.)

RYLAND, Judge, delivered the opinion of the court.

This was an action commenced originally before a justice of the peace, by the plaintiffs, Stone and others, against Corbett. The suit was against Corbett, as assignor of a note executed by John E. Wood to said Corbett, and which Corbett had assigned to the plaintiffs. The amount due on the note was \$138 50, exclusive of interest, the note being originally for \$151, payable five months after date, and dated April 16th, 1849. It was assigned to plaintiffs on the same day on which it was executed. On 10th September, before the note was due, the plaintiffs received from Wood, the maker and payer, the sum of \$12 50, in payment of so much of said note. This payment was made in boots. On 13th December, 1849, the plaintiffs commenced their suit against Wood before a justice of the peace, and prosecuted it until *nulla bona* was returned by the constable. However, the facts appear upon an agreed statement made by the parties in the Circuit Court, upon which statement the court found the law for the plaintiffs, and judgment was given for plaintiffs. This statement is as follows :

“Defendant assigned the note in question to plaintiffs, April 16th, 1849. The note was for \$151, dated April 16th, 1849, and due five month safter date, executed by John E. Wood. On the 10th September, 1849, plaintiffs received of Wood, in boots, \$12 50, in payment of so much of the note, and credited it thereon. On the 13th day of December, 1849, plaintiffs commenced suit before a justice of the peace of Blue township, and prosecuted suit against Wood to judgment. Execution issued on the 31st day of December, 1849, and on the 1st day of April, 1850, said execution was returned *nulla bona*. Execution came to the hands of the constable of Blue township, 21st January, 1850. It is further agreed that, up to the time that plaintiffs commenced suit against Wood, said Wood had property to the amount of \$600, in boots, shoes and leather ; that, before execution issued against Wood, and on the day of the judgment against Wood, said Wood sold out to Cogswell a n

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had no property ; that, at the time of the assignment, Corbett was about starting to Santa Fé, and did go, and did not return until after the note was due ; that two justice's law days intervened between the time that the same note became due and the commencement of the suit against Wood, at either of which plaintiffs might have sued Wood on said note ; that the parties resided in Blue township, and the property of Wood was in said township up to the time it was sold to Cogswell ; from the time said note came due to the time it was sued on, there was no Circuit Court held in Jackson county, and not until March, 1850, to which suit could have been brought on said note." The defendant moved for a new trial, which being overruled, he appeals to this court.

1. In a case like this, where the facts are agreed to and set down in writing, there was no necessity to ask the court to declare the law upon the agreed facts ; that was the duty of the court, without being asked, and having pronounced judgment upon the agreed facts, if they will not warrant it, it must be reversed.

2. We have no hesitation in saying the facts will not support the judgment of the court below. There is not due diligence shown by the plaintiffs in prosecuting their suit on the note assigned to them. They suffered two justice's law days to pass over without bringing their suit ; this, too, after the note had been, by partial payment, brought within the jurisdiction of a justice of the peace, before it was due. There is no excuse for this delay ; for this negligence to sue ; for this want of diligence. The plaintiffs rely upon the fact, that the note being, when assigned to them, for \$151—an amount over the justice's jurisdiction—they, although having received part payment, thereby reducing it within the justice's jurisdiction, were, nevertheless, authorized to wait and sue in the Circuit Court ; and there being no term of the Circuit Court until March following the maturity of the note, they could not be charged with laches or want of diligence. There is nothing in this excuse, or rather in this view of the case ; they themselves do not wait until the Circuit Court in March ; but they sue in December previous,

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and sue, too, before a justice of the peace. The parties all live in the same township, yet two law days elapse in which suit might have been brought on this note in that township, and no suit brought. Why this delay? and why afterwards sue in the township in the justice's courts? There is no diligence here, and the plaintiffs have lost their recourse against the assignor. In the case of *O'Fallon, Ex'r of Delany, v. Kerr*, (10 Mo. Rep. 553,) this court held that, to make the assignor liable, suit must be instituted at the first term after maturity, or there must be some excuse for not doing so. (See *Collier v. Warburton & Riley*, 3 Mo. Rep. 203.) Due diligence requires suit to be brought at the first court after maturity, unless a reasonable cause for the failure to do so be shown. Here there is no cause. It is idle to say that, because the note, when first assigned, was for \$151, if it should have been reduced afterwards by payments below fifty dollars, the suit must still be commenced in the Circuit Court by the assignee, or that the assignee can have his choice, and let two justice's courts pass by, if he afterwards sues in another justice's court, before the next Circuit Court begins its term. Due diligence requires suit to be brought at the first court having jurisdiction over the subject matter. We do not think that it requires plaintiff to take extraordinary means to sue, such as by attachment; but he must sue in the ordinary course of legal proceedings at the first term; and if he fail to do so, he loses his recourse against the assignor. This statement of facts will not, therefore, warrant the judgment of the Circuit Court.

3. Another fatal objection is found in this record. Here, the assignees bring suit against the assignor for \$138 50. This is not on a note, but is an action of *assumpsit* or on account. It is not on a direct promise to pay money, but is on an implied undertaking by the assignor to pay, if the maker does not; provided due diligence be used by the assignees in coercing or trying to coerce payment from the maker. It is not "an action on a bond or note for the payment of any sum of money exceeding fifty dollars, exclusive of interest, and not exceeding

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one hundred and fifty dollars." It is one of those cases in which, if damages are sought over ninety dollars, the justices of the peace have no jurisdiction. If the amount in controversy exceed ninety dollars, in a case like this, the justice of the peace has no jurisdiction. The parties cannot confer jurisdiction by consent. The record shows that they waived the subject of jurisdiction. I mention this subject, to let parties see that they had better take pains and begin their suits in the proper courts. The first view of this subject, that is, the want of due diligence, is fatal to the plaintiffs' action on the merits. I mention the last, that hereafter such cases may be brought in the proper courts. The judgment below is reversed, and the suit dismissed; Judge Scott concurring.

SMITH, Plaintiff in Error, *vs.* ASHBY, Defendant in Error.

1. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning "bonds and notes," (R. C. 1845.)

Error to Jackson Circuit Court.

This was a suit by Smith, the assignee for value, against Ashby, the maker, upon the following note:

"Twelve months after date, I promise to pay John W. Moodie, or order, one hundred and seventy-one dollars and fifty cents, for value received, without defalcation or discount.

"THOS. T. ASHBY.

"November 15, 1849."

This note was by Moodie assigned to plaintiff in July, 1850. The defendant set up, as an off-set, a note for one hundred and eighty dollars, executed by Moodie to him on the 7th of August, 1850, before he had notice of the assignment. The off-

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set was allowed by the Circuit Court, and the plaintiff sued out this writ of error.

James K. Sheley, for plaintiff in error. 1. The note upon which this suit was founded being payable "without defalcation or discount," the off-set could not be allowed. (R. C. 1845, p. 190, §3. *Collins v. Waddle*, 4 Mo. Rep. 450.) 2. The third section of article three of the new code does not repeal the law as it stands in the revised code, unless it be by implication, and the law does not favor such repeals. (24 Pick. 296. 5 Hill, 221. 6 Porter, 219.) 3. The third section was only intended to apply to ordinary notes, and not to notes payable "without defalcation or discount."

J. W. Morrow, for defendant in error. The third section of the third article of the code of 1849 gives Ashby the right to set-off his note against Moodie in this suit, because he had no notice of the assignment of the note by Moodie to Smith. That section was designed to change the third section of the act concerning "bonds and notes," (R. C. 1845,) and to allow an off-set, which accrued against the assignor *before notice* to the maker of the assignment, to all notes except such as are expressed to be "for value received, negotiable and payable without defalcation."

LEONARD, Judge, delivered the opinion of the court.

The question in this case is, whether the third section of the third article of the code of procedure repeals so much of the third section of the statute concerning bonds and notes, as provides that the assignment of a note, expressed "to be paid without defalcation or discount," passes the instrument to the assignee, exempted from that defence.

There is no express repeal, and if repealed at all, it is because the provision of the code is inconsistent with the provision of the old law concerning bonds and notes. In order to come to a correct conclusion upon this subject, it will be proper to refer to what our law was in reference to these matters, when the new code was adopted.

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Debts, being mere *choses in action*, were not assignable at law; but a different rule prevailed in equity, where assignments for value were always valid. Debts, however, being incapable of delivery, like a movable chattel, notice to the debtor was held essential in equity to complete the title, except as against the assignor. By our statute law, however, all bonds and notes were made assignable, and the assignee acquired, without notice to the debtor, a legal title to the debt—the “*jus in re*.” This title, however, was subject to various defences, according to the particular character of the instrument. If it were a note containing the words, “for value received, negotiable and payable without defalcation,” it passed to the assignee according to the law merchant, discharged of every defence existing against it in the hands of the payee. If it contained the words found in the present instrument, “to be paid without defalcation or discount,” it passed discharged only from that particular defence, and subject to every other exception that could be alleged against it. (*Collins v. Waddell*, 4 Mo. Rep. 450.) If it contained neither set of words, the assignee took it subject to every exception existing against it at the time his title accrued. When the legal title passed, the suit was in the name of the assignee and at law; but if it were only an equitable title, the suit was necessarily in equity, and in the name of the equitable owner. Courts of law, however, were beginning to give effect to these equitable assignments, by allowing the assignee to sue to his own use in the assignor’s name, and then treating the beneficiary of the suit as the owner of the debt and as the real plaintiff upon the record. Such being our law, the code is introduced, which provides, in the first section of the third article, that “suits must be prosecuted in the name of the real party in interest;” and then, in the third section of the same article, declares that, “in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to an off-set or other defence existing at the time of or before notice of the assignment; but this section shall not apply to bills of exchange, nor to promissory notes for the pay-

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ment of money, expressed on the face thereof to be for value received, negotiable and payable without defalcation." The argument for the repeal is, that, providing that the bringing of the suit in the name of the assignee should not deprive the defendant of any set-off or defence existing at the time of or before notice of the assignment, and that this provision should be inapplicable to negotiable paper, was impliedly introducing a new rule of property in every case of an assignment of a thing in action other than of negotiable paper, and is, in effect, an implied provision that every assignee, except of negotiable paper, shall take subject to every set-off and other defence existing at the time of or before notice of the assignment; and so, under our laws, embraces bonds and notes "payable without defalcation or discount;" which, being inconsistent with the old law exempting such paper, when assigned, from set-off, necessarily repeals so much of it.

We may remark that this new system of procedure did not originate here, but in New York; and it is believed that there, all debts, other than negotiable paper debts, were only assignable in equity; and therefore, this provision of the code produced no change there in the rules of property, and was probably made, out of the abundance of caution, lest the change in relation to the bringing the suit in the name of the assignee should be construed to have the effect of annulling these equitable defences of the debtor; and this is the more probable, as in New York this was the only practical effect of the provision.

Here, however, the proposed construction of the provision changes a rule of property. An assignment that, under the old law, passed a debt exempted from set-offs accruing after the assignment and before notice, is, by the proposed construction, to pass it subject to such set-offs. It is a wise rule, in the construction of statutes, not to favor a repeal of the old law by implication, and if both acts can be so construed as to stand together, it is the duty of the courts to adopt such construction. If it were the intention of the legislature to effect this change in an old rule of property, no reason is seen why,

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instead of using direct and unmistakable language for that purpose, they used the negative expressions adopted in New York, most probably out of the abundance of caution, to prevent any change in the rules of property by the introduction of this new system of remedies. We may remark, in this connection, that the purpose of the legislature, in adopting this code, was not to lay down new rules of property, but to provide a better system of remedies for the protection and enforcement of rights, as they stood under the existing laws; and this fact ought to be kept in view in construing its provisions, and must influence the judgment of the court, when an effort is made to extract from ambiguous expressions in it a meaning which is to effect a repeal of an existing rule of property, and substitute a different rule in its place. The question is certainly not free from doubt, but the best judgment we can come to is, that no such change was within the contemplation of the legislature; and as it is the part of wisdom to abide by the old law, in cases of doubt, we shall allow it to stand untouched by the provision in the code to which reference has been made.

The effect of the opinion is, that the judgment must be reversed, and the other judges concurring, it is reversed accordingly, and the cause remanded, to be re-tried in conformity to what is here declared to be the law of the case.

BRILL, Respondent, vs. MEEK, Appellant.

1. After an appeal has once been granted, the power of the inferior court over the subject is exhausted. If the appeal is dismissed, or if from any cause the party loses the benefit of it, he cannot take another appeal, but must resort to his writ of error.

Appeal from Weston Court of Common Pleas.

A judgment was rendered for Brill below, in November, 1853, and Meek took an appeal to the Supreme Court, where it was dismissed because not prosecuted. In February, 1854,

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Meek again appeared before the court below, and filed a new bond and prayed another appeal, which was granted.

Hall and Vories, for defendant, now moved to dismiss the second appeal, on the ground that only one appeal could be allowed, even within the year; as otherwise the respondent might be harassed by successive appeals, and subjected to great trouble and expense.

Gardenhire, for appellant. If an appeal is dismissed, the penalty is the payment of costs. This is sufficient to protect the respondent from oppression. This court must be open to the appellant "one year," and a certain remedy afforded for the injury of which he complains. A dismissed appeal is like a judgment of nonsuit.

SCOTT, Judge. When an appeal has once been granted, the power over the subject is *functus officio* and cannot be exercised a second time. This has been the uniform practice. After a party, from any cause, has lost the benefit of his appeal, he is driven to his writ of error. The appeal is dismissed, Judge Ryland concurring; Judge Leonard not upon the bench.

HULL, Plaintiff in Error, *vs.* DOWDALL, Defendant in Error.

1. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional.
2. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled.

Error to Buchanan Court of Common Pleas.

This was a motion filed by Hull to quash an execution upon a judgment entered by the clerk in vacation in favor of Dowdall against Parker upon confession, and for an order upon the sheriff to apply the money made under the execution, upon a subsequent attachment issued by Hull against Parker.

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It appeared that Parker filed a written statement in the clerk's office in vacation and authorized judgment to be entered in favor of Dowdall, on the 22d of April, 1854. On the same day, the clerk entered the judgment upon the record, but did not endorse it upon the statement filed. On the 25th of April, an execution was issued upon the judgment, returnable on the 12th of June, which the sheriff levied upon a slave of Parker on the 28th of April. On the 29th of April, an attachment issued against Parker at the suit of Hull, which was also levied upon the slave. The sheriff sold the slave under the execution on the 13th of May, and paid over the amount of the execution to Dowdall on the 16th of May. On the 12th of June, the return day of the execution and attachment, the present motion was filed. On the same day, the clerk, by leave of court, endorsed the judgment confessed by Parker upon the statement filed by him, *nunc pro tunc*. The motion of Hull was then overruled, and he sued out this writ of error.

Loan, for plaintiff in error.

Vories, for defendant in error.

LEONARD, Judge, delivered the opinion of the court.

The validity of the judgment is contested on two grounds.

1. The unconstitutionality of the provision in the new code of practice, authorizing the clerks of the circuit courts to enter judgments on the confession of a party.

This question was settled thirty years ago, in *Finley & Bryson v. Caldwell*, (1 Mo. Rep. 513,) where it was expressly decided that a similar provision in the court act of 1820, (2 Edward's Dig. 686,) was constitutional. This decision has been acted upon ever since, (*Phelps v. Hawkins*, 6 Mo. Rep. 198,) and we would not feel at liberty to disturb it, even if we questioned the propriety of the original determination. No such doubt, however, is entertained; but it is enough that it is the doctrine of the court, acquiesced in until it has become a rule of property.

2. The omission of the clerk to endorse the judgment on the

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written statement of the defendant, pursuant to the third section of the twenty-second article of the code.

We do not see any reason in our practice for requiring the clerk to enter the judgment "on the records of the court," and also to endorse it on the "statement of the defendant." The legislature, however, have required *both*, and the direction ought to be observed by the officers for whose government it was made. We, however, cannot reverse a judgment for the want of a formality, the omission of which prejudiced no one, and which was supplied by making the required endorsement before the judgment now complained of was given.

The other judges concurring, the judgment is affirmed.

DOWD, Appellant, vs. WINTERS *et al.*, Respondents.

1. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler v. Servoss*, 6 Mo. Rep. 24, affirmed.)
2. The supreme court will not refuse to set aside a nonsuit taken upon the rejection of material evidence necessary to the plaintiff's recovery, because the record does not show that the plaintiff was prepared with proof upon the other material facts of the case, or because the evidence may possibly have been rejected for the reason that it was offered out of the order of time prescribed by the court trying the cause.

Appeal from Weston Court of Common Pleas.

This was an action of slander against Jacob Winters and Elizabeth, his wife. The petition states that Mrs. Winters had charged the plaintiff with false swearing, and that this charge was made in reference to material testimony given by the plaintiff upon the trial of a certain cause between the city of Weston, plaintiff, and Elizabeth Winters, defendant, lately had before Thompson Ward, mayor of the city of Weston, who had jurisdiction of the cause and was authorized to administer oaths.

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The answer put in issue the jurisdiction of the mayor and the materiality of the testimony given by plaintiff. At the trial, the plaintiff offered in evidence the record of a proceeding of the city of Weston against Jacob Winters and Elizabeth Winters. The court excluded this record, whereupon the plaintiff took a nonsuit.

Hall, for appellant, cited *Hibler v. Servoss*, (6 Mo. Rep. 24,) upon the point that there was no variance.

Gardenhire, for respondent, insisted that the nonsuit ought not to be set aside, because the record contained no evidence whatever in relation to the jurisdiction of the court and the materiality of the testimony, both of which were necessary to a recovery. The plaintiff ought to have offered enough evidence to induce a reasonable belief that he could recover if put back in court again. At least, he should have offered the evidence necessary to show that the rejected evidence was competent.

LEONARD, Judge, delivered the opinion of the court.

The facts put in issue by the pleadings are the jurisdiction of the mayor's court, and the materiality of the testimony given upon the trial there.

In the briefs submitted to us, it has been insisted, on the part of the appellant, that there is no variance between the allegation and the judicial proceeding offered in evidence, and therefore, the nonsuit ought to be set aside; and on the part of the respondents, that the plaintiff gave no evidence of the jurisdiction of the mayor's court, (the act conferring jurisdiction upon him not having been put in evidence,) without which the plaintiff could not have recovered; and that, for that reason, the nonsuit ought to stand.

1. The allegation is of a judicial proceeding between the city of Weston and Elizabeth Winters, and the proof offered of a judicial proceeding between the city of Weston and Elizabeth Winters and her husband, Jacob Winters; and that this is no variance, is settled in *Hibler v. Servoss*, (6 Mo. Rep. 24,) which must control this point.

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2. In order to make out the jurisdiction of the mayor's court, and the materiality of the plaintiff's evidence before him, it was necessary to show in evidence the alleged judicial proceeding. The law has not prescribed the order in which parties shall introduce their evidence upon a trial, but has left the matter to the discretion of the tribunals in which the trials occur; and the courts, in practice, generally leave it to the parties themselves, to take their own order, in the introduction of their testimony. According to the course of business, the rejection of any material evidence, offered by the plaintiff and necessary to his recovery, puts a stop to the trial at the point where it occurs, the party taking a nonsuit and bringing his case here, if dissatisfied with the opinion; and this court, construing the record with reference to the practice, has never, we believe, refused to set aside a nonsuit, where the evidence was improperly rejected, either on the ground that it did not appear on the record that the plaintiff was prepared with proof on the other material facts of his case, (*Hart v. Rector*, 7 Mo. Rep. 532,) or because the evidence may have been rejected on account of its being introduced out of the order of time prescribed by the court.

We think, then, there being no variance in the point stated, and no other objection being suggested to us, that the proof was improperly rejected, and that the judgment must be reversed, and the cause remanded for a new trial; and the other judges concurring, it is so ordered.

WOOD, Respondent, vs. SIMMONS, Appellant.

1. Upon a sentence of divorce, a wife becomes entitled to all *choses in action* not previously reduced into possession by the husband, as by survivorship upon the death of the husband.
2. A particular assignment for value by husband and wife of the wife's reversionary interest in a chattel, expectant on the death of a tenant for life, does not defeat the wife's right of survivorship, where the husband dies before the death of the tenant for life. The assignment, in such a case, does not operate as a constructive reduction into possession by the husband.

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LEONARD, Judge, delivered the opinion of the court.

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Appeal from Saline Circuit Court.

In 1836, the plaintiff, who was the daughter of Rice Wood, deceased, intermarried with Albert G. Wood. In 1848, her father died intestate, leaving a widow and four children, including herself. Afterwards, on a division of the estate, the widow's dower was assigned and delivered to her, and consisted of real estate, some slaves and other personal property. In May, 1849, the plaintiff and her husband, by their deed of that date, duly acknowledged and certified so as to pass the wife's real estate, in consideration of \$500, sold to the defendant, Simmons, the wife's interest in this dower property. In 1850, the plaintiff obtained a sentence of divorce against her husband, dissolving the marriage. Afterwards, in 1850, the plaintiff's mother died. The defendant now claims the wife's interest in the dower slaves under the deed of May, 1849. The plaintiff has several children, all the property received from her father went into the husband's possession and was squandered by him, and she left to support herself and children.

The prayer of the plaintiff's petition was, that the property be secured to her for the support of herself and children, and the defendant restrained from insisting on his title acquired by the deed of 1849. The defendant demurred for want of sufficient matter to constitute a cause of action and for defect of parties. The demurrer was overruled, and the defendant failing to answer, the court decreed a perpetual injunction against the defendant's setting up title under the deed to the slaves and other personal property, and defendant appealed.

A. Leonard, for appellant. 1. The relation of husband and wife between these parties is extinguished by the divorce, and so no question can arise now about the wife's equity to a settlement, or her right to a maintenance out of her own property, founded on her husband's desertion or inability to support her. 2. A conveyance for value by husband and wife of her reversionary interest in a *chase in action* passes her interest to the assignee, discharged of her right of survivorship. (4

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Rawle, 472. 2 Atk. 207. 2 Atk. 549. 2 P. W'ms, 608. 2 Kent's Comm. (7th ed.) 117. 1 Tucker's Comm. 118.) 3. If this be otherwise, her interest in these dower slaves is a vested legal estate in remainder, and not a mere reversionary interest in a *chose in action*, in which the wife has a right of survivorship. (2 Conn. Rep. 567. 3 Howard (Miss.) Rep. 394. 5 Littell, 258. 2 B. Monroe, 77. 10 B. Monroe, 412. 3 Littell, 277.) 4. If the plaintiff's right to the property be admitted, there is no ground stated in this petition to warrant this judgment against the defendant. (2 Story's Eq. 700, *a*, p. 13. 3 Brown's Ch. Rep. 15. 5 Vesey, 286. 3 Mylne & Craig, 107, (14 Eng. Ch. Rep.)

Napton, for respondent. 1. All assignments made by the husband of the wife's outstanding personal chattel, which is not and cannot then be reduced into possession, whether the assignment be in bankruptcy, or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship. (*Purdew v. Jackson*, 1 Russ. Ch. Rep. 1. *Hornsby v. Lee*, 2 Madd. 16. *Mitford v. Mitford*, 9 Ves. 87. *Stamper v. Barker*, 5 Mad. 157. *Morley v. Wright*, 11 Ves. 17. *Honner v. Morton*, 3 Russ. 65. *Styfe v. Everett*, 1 Mylne & Craig, 37. *Woodland v. Croucher*, 12 Ves. 177. *Richards v. Chambers*, 10 Ves. 580. *White v. St. Barbe*, 1 Ves. & B. 405. *Pickard v. Roberts*, 3 Madd. 385. *Pierce v. Thornby*, 2 Sim. 181. *Ellison v. Elwin*, 13 id. 309. *Burnett v. Kynaston*, 2 Vern. 462. *Gray v. Kentish*, 1 Atk. 280. Gill. Eq. R. 38. 2 Story's Eq. §1413. 2 Kent's Comm. 116, 119, notes.) 2. It will not be disputed that in this case, the wife would be entitled to her equity, if the husband were living. If it is, there is an unbroken current of authorities in favor of the proposition, both English and American. (3 Kent's Comm. (7th ed.) p. 138. 2 Story's Eq. tit. *Husb. & Wife*. *Schuyler v. Hoyt*, 5 John. Ch. Rep. 208. 4 John. Ch. Rep. 318. 6 John. Ch. Rep. 178. 5 John. Ch. Rep.

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464. 3 Cow. 590.) That the husband's death does not affect the wife's equity, except in cases where she gets the the whole as survivor, is abundantly shown by the authorities. (5 J. C. R. 475. 2 Atk. 417. 3 Ves. 506. 1 Russ. Ch. Rep. 28.) 3. It is immaterial whether the wife took in this case by survivorship, or was merely entitled to her equity. In either event, the judgment upon the demurrer must be sustained. The court may, in its discretion, give the whole or a part only of the property to the wife, according to the circumstances, and there is nothing in the record to show any improper exercise of discretion in giving the whole. On the contrary, the facts disclosed in the petition show a case in which she was clearly entitled to the whole.

RYLAND, Judge, delivered the opinion of the court.

The questions involved in this case are of much importance to the community, and have engaged our earnest and serious attention. These questions have met with different solutions in some of the states of our Union. But we are inclined to think that the weight of authority, both in England and in this country, is on the side of the plaintiff, Wood. Do the facts in this case authorize the court to declare that, in the present state of the law, the wife's right of survivorship must prevail over the assignee of the husband and wife? We answer in the affirmative.

1. Here, the divorce obtained by the wife from the husband must, in law, be considered the same as the death of the husband; and the wife must be looked upon as his widow. In the case of *Browning v. Headly*, (2 Rob. Va. Rep. 340,) the divorce obtained by the wife from the husband by the legislature of Kentucky, was considered as operating as the civil death of the husband. Judge Stanard said: "I concur in the opinion of Judge Allen, that the effect of the act of divorce upon the rights of the wife is to place her in the same position as if her husband had then died." I dismiss, therefore, this question, by stating that there is no doubt of the correct-

ness of the judgment below, so far as it considers the divorce of the wife from the husband operating so as to place the wife in the situation she would have occupied had her husband then died.

2. But the more important question, "does the conveyance for value of the husband and wife of the wife's reversionary interest in the slaves and other property belonging to her mother in her dower right, pass the wife's interest to the assignee, discharged of her right of survivorship?" remains yet for our consideration. This question we, after considering the various authorities, unhesitatingly answer in the negative.

By the common law, the husband was entitled to administration on his deceased wife's estate, and, like all other administrators, had exclusive enjoyment of the residuum after payment of debts.

The statute of 22 and 23 Charles II, chap. 10, compelled the administrator, after the payment of funeral charges, debts and all expenses, to distribute the remainder of the personal estate to the wife and children, and children's children, if there be any, or otherwise to the next of kindred to the dead person.

There were doubts whether, under this last statute, the husband was not, like all other administrators, compelled to make distribution among the next of kin of the deceased wife.

To remove these doubts, the 25th section of 29 Charles II was enacted, which placed the estates of *feme coverts* dying intestate without the operation of the 22 and 23 Charles II, and left their husbands the same power and privileges as they had before the passage of the 22 and 23 Charles II. The husband then succeeded, by his right to administer upon the estate of his wife, after payment of funeral expenses and debts, to the residuum of her estate, discharged from the burden of distribution among her next of kin. This rule of the common law has been adopted by some of the states of our Union, and not by others. The state of Missouri has not adopted it. Nor can the husband, as the wife's administrator, receive the estate of the wife with us, discharged from the burden of distribution; but, like other administrators, he must account to those entitled,

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under our laws, to the same. We call in the kin of the wife from the four corners of the earth, and distribute to them before the husband can take.

In the case of *Leaky's Adm'r v. Maupin*, (10 Mo. Rep. 372,) this court held the following doctrine—the opinion delivered by Judge Scott, the other judges concurring: “Marriage is, by law, an unqualified gift to the husband of all the personal estate of the wife in her possession at the time of its taking place, and if he should die in an hour after the marriage, having received a large personal estate from the wife, all of that estate, except what our law allows her as dower, would go to the kindred of the husband and not to the wife. But as to *choses in action*, or mere rights to receive money or property from another, the law only gives the husband a *qualified* right to them, viz: on condition that he reduces them to possession during coverture, and if he fails to do this, if the wife survive, she will be entitled to them. This principle is applicable as well to *choses* belonging to the wife at the time of marriage, as to those which accrue to her during coverture. The distinction between the two classes of *choses* is this, that, in a suit to recover the former, the wife must be joined with the husband; in a suit for the latter, the husband may join his wife or not, at his election; if he sues alone and recovers judgment, it is an election to have the chattel in his own right freed from the right of survivorship in the wife; if he joins her in the suit, her right of survivorship still continues after judgment.” This decision has an important bearing on the case now before us. The right of the wife’s survivorship to *choses* not reduced by the husband into possession before his death is plainly announced, and that there is no distinction in such an event between *choses* at the marriage and *choses* during coverture. We must then see if there had been such a reduction into possession as will enable the husband to assign, discharged from the right of the wife’s survivorship.

In *Purdew v. Jackson*, reported in 1 Russ. Ch. Rep. 1, Sir Thomas Plumer, Master of the Rolls, held that, “Where hus-

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band and wife, by deed executed by both, assign to a purchaser for valuable consideration a moiety of a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life of that fund, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of her share of the fund against such particular assignee for a valuable consideration." This case was determined in February, 1824, and may now be considered as the settled doctrine of the English chancery. This case was most thoroughly investigated, being twice argued by Mr. Sugden for the particular assignee for value, and by Mr. Shadwell for the wife. A general review of the English cases will be found in this case.

Sir Thomas Plumer, Master of the Rolls, begins by saying : "The property in question is a moiety of one-seventh share of a fund in court, which Mrs. Bolton was entitled to have transferred to her, upon the death of Isabella Purdew. In October, 1812, she and her husband transferred, for a valuable consideration, this moiety to Rose. In the assignment, Bolton contracted that, immediately after the death of Isabella Purdew, Rose should have the right to demand and sue for this personal chattel in the name of Mr. and Mrs. Bolton, or either of them, and that, in the mean time, his life should be insured. Bolton died in 1819, in the life time both of Isabella Purdew and Mrs. Bolton. The tenant for life being now dead, Rose insists upon his right under the assignment, and that raises the general question whether, where the wife has an interest in reversion or remainder, in a personal chattel, expectant on the death of another person, and the husband assigns this interest for valuable consideration and dies before the determination of the life estate, the right of the surviving wife is barred."

The Master of the Rolls proceeds : "There are two points which deserve attention ; first, what is the nature of the legal right of the husband in a personal chattel to which the wife is entitled in reversion or remainder ; secondly, has the person to whom, for valuable consideration, the husband assigns a chat-

tel so circumstanced, the same right with his assignor, or has he a different or a better right?" He then quotes from Mr. Roper's Treatise on the law of Husband and Wife: "Marriage is only a qualified gift to the husband of his wife's *choses in action*, viz: upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it."

"What then, is meant by a *chose in action*? The terms "*chose in action*," and "reduced into possession," are legal phrases, not borrowed from a court of equity, but derived from the language and doctrines of the common law; and in dealing with them, it is of importance that we should confine ourselves strictly to the subject before us, "a personal chattel," and not perplex ourselves with principles applicable only to real property. The right of property in a personal chattel is inseparable from possession. The law of England does not know such a thing as the possession of a personal chattel being in one man, unless by the authority of the rightful owner, while the right of property is in another. If you have not the possession, you may have an immediate right of action; but till you recover the possession of the chattel, you have not the right of property. When it is reduced into possession, the property in it vests, and not before; for the property in a personal chattel does not become complete till possession is obtained. Therefore, the law of England, speaking of the different sorts of property which a married woman may have, and designating a *chose in action* to be a mere right of action to a personal chattel not in actual possession, holds that the husband must, as a condition, without fulfilment of which he does not acquire a right to it, reduce the thing into possession; that is, he must make the property his own, for, without possession, the property is not his; he has only a right of action, which will ultimately belong either to himself or to his wife, according as the one or the other may happen to survive. Now, in 1812, the

property in question, strictly speaking, was a *chose in action*; it was not, it could not be in possession; not only was it not in possession, but there was not even a present right of action; the right of action was future, and would necessarily remain so till the death of Isabella Purdew. The thing belonging to the wife was therefore a personal chattel, legally denominated a *chose in action*, as contra distinguished from a chattel reduced into possession."

"The next question is, "What is the effect of the assignment?" A great deal of fallacy has been introduced into this part of the argument, from not considering that an assignment makes no alteration in the thing transferred. When the husband has assigned the wife's *chose in action*, does the thing assigned continue to be a *chose in action*, or does it become a personal chattel in possession? If it does not continue after the transfer to be a *chose in action*, what makes it cease to be so? A *chose in action* cannot cease to be a *chose in action*, except by being reduced into possession; but it would be a contradiction in terms, in the very statement of the case, to say that this fund, which could not be reduced into possession till 1822, was reduced into possession in 1812. It is in vain to talk of Bolton's assignment as being a constructive reduction into possession. In cases where there is a present right, and an assignment of it is immediately followed by possession of the thing, the assignment, being the commencement of that immediate actual possession, may be regarded as a kind of constructive possession. But to say that the assignment of a *chose in action*, which is at the time incapable of being reduced into possession, is to be construed as a reduction of it into possession, is to ascribe to the assignment the effect of totally transforming the nature of the thing assigned. Up to the time of Isabella Purdew's death, the thing which Bolton assigned continued to be a *chose in action*. While it was in that state, Bolton died without having been able to fulfil the condition on which alone the law gives the husband the *choses in action* of the wife; therefore, the legal right of the wife now attaches

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upon it, and if a court of equity were to take it from her, equity would not follow, but oppose the law. The wife is entitled by the law to take the chance of outliving the husband, and it is the law which says that, if she survives him, the *choses in action* which were formerly her's, shall continue to belong to her. That is the clear legal doctrine, and there is nothing in equity to modify or alter it. Even where a *chose in action* of the wife is sought to be bound by a decree in equity, if the husband dies before the thing ceases to be a *chose in action*, that is, before there is an order for the payment of the money, the consequence in equity is precisely the same as it is at law under analogous circumstances—the surviving wife is entitled. Her title, in such cases, is not a creature of this court; it is not a mere matter of practice or regulation here; it is the wife's positive legal right—the result of a fixed rule of law."

In the same case, the Master of the Rolls said: "The doctrine respecting assignments by operation of law has been long settled by a train of cases from *Grey v. Kentish* to the present time, without one authority to the contrary. The wife's equity uniformly prevails against the assignees of the bankrupt." "An opinion has certainly prevailed," says Sir Thomas Plumer, "that a distinction subsists between an assignment by operation of law, and an assignment for a valuable consideration to an individual by contract; that the former is no bar to the right of the surviving wife, but that the latter is." He continues: "That there may be, for some purposes, a difference between these two species of assignment, may be true; but that they should be productive of effects so directly contrary in this instance, is a proposition for which I can find no solid ground. I think both kinds of assignment ought to have the same effect, and that it would be manifest inconsistency to decide the contrary. In both cases, the assignment passes the share of the wife, but passes it *sub modo*, viz: provided the assignees receive the share, or its value, during the life of the husband; but if he dies before the share is reduced into possession, and it is left to be a *chose in action* when the interest

accrues, the surviving wife is entitled, as well against the assignees for value, as against the assignees by operation of law."

Chancellor Kent says: "The court of chancery has always discovered an anxiety to provide for the wife out of her property in action, which the husband may seek to recover. If he takes possession in the character of trustee, and not of the husband, it is not such a possession as will bar the right of the wife to the property, if she survives him. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take as survivor, instead of the personal representatives of the husband."

"A general assignment in bankruptcy, or under insolvent laws, passes the wife's property and her *choses in action*, but subject to her right of survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife; for the assignees possess the same rights as the husband before the bankruptcy, and none other. It has been accordingly held that a legacy in stock was not reduced to possession by such an assignment, so as to bar the wife's right of survivorship, and the wife took it by survivorship as against the assignees.

"The wife's equity to a reasonable provision out of her property, for the support of herself and her children, makes a distinguished figure in the modern chancery cases, which which relate to the claims of the husband upon the property of his wife in action. If the husband wants the aid of chancery to enable him to get possession of his wife's property, or if her fortune be within the reach of the court, he must do what is equitable, by making a reasonable provision out of it for the maintenance of the wife and her children. Whether the suit for the wife's debt, legacy or portion be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a portion of the property. The provision is to be proportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the hus-

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band had previously received. And perhaps chancery ought, on just principles, to restrain the husband from availing himself of any means, *either at law or equity*, of possessing himself of the wife's personal property in action, unless he would make a competent provision for her." (2 Kent's Com. 138, 139.)

In *Hayward v. Hayward*, (20 Pick. 519,) the Supreme Court of Massachusetts declared that, "if a distributive share of intestate personal estate accrue to a married woman during coverture, and the husband die before the decree of distribution, and without any act on his part reducing it to possession, it survives to the wife." In this case, Judge Dewey makes a general review of the English cases, and overthrows the case of *Griswold v. Penniman*, (2 Conn. 564,) relied on by the defendant's counsel in this present case to support, in part, his propositions.

I shall not notice, *in extenso*, this opinion of Dewey, Judge; it is a lucid and able argument in support of what I consider the law on the subject of the wife's right of survivorship. He says: "The general rule, as to *choses in action* which belong to the wife at the time of the marriage, is well settled. They do not vest absolutely in the husband. He acquires by marriage only an inchoate right: he may reduce them into possession and take the avails of them; but if the wife survives the husband, and the *choses* remain uncollected, she is entitled to them, and they do not pass to his representatives." Such he shows also to be the law in regard to *choses in action* accruing to the wife during coverture, and the attempted distinction between them is without principle.

In *Schuyler v. Hoyle*, (5 John. Ch. Rep. 176,) decided in 1821, before the great case of *Purdew v. Jackson*, for that was in 1824, Chancellor Kent said: "After looking into the authorities, and upon a consideration of the doctrine of the cases, there remains no doubt in my mind, that the wife was entitled, as survivor, to all that portion of her distributive share which remained in the hands of the administrator of Mr.

Fisher, at the time of her husband's death. We should act in contradiction to the whole course of decisions, if we were to consider the share of the wife, before it passed out of the hands of the administrator, as being reduced to the husband's possession."

In *Pinkard et al. v. Smith & wife*, (Littell's Selected Cases, 336, 337,) it is laid down that a vested remainder in slaves, accruing to a woman during coverture, vests in her husband as much as a right in possession would; and yet it was held that, if the husband should die before the determination of the particular estate on which the remainder depended, it would survive to his wife. Now personal estate of the wife, which the husband reduces into possession, becomes his, and goes to his personal representatives, and not to her's. There is a seeming inconsistency in some of the Virginia decisions, and this Kentucky case is founded on the Virginia decisions. In this case, (*Pinkard v. Smith*,) Judge Owsley says: "But notwithstanding the husband, as he survived his wife, might have maintained an action in his own name to recover the slaves, it does not thence follow that the wife would not have been entitled to them as survivor of her husband, had he died before her. To recover the slaves during coverture, the suit might have been brought either in the name of the husband alone, or in the name of the husband and wife. It is a general rule that, wherever the suit may be brought either in the name of husband and wife, or in the name of the husband, the right will survive to the survivor. These observations have been made on the supposition that the interest which a husband gains in the slaves accruing to the wife during coverture, is to be regulated by the principles of the common law in relation to chattels; and that we have supposed, because we infer that the statute of this country has placed slaves, as to the husband's interest, on the footing of chattels. The statute of this country, to which we allude, (2 Digest 1156,) was taken from a statute of Virginia, in force at the separation; and by the appellate court of this country, this statute has been construed to place slaves on a

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level with chattels accruing to the wife during coverture. Accordingly, in 2 Call's Rep. 447, it was held that slaves devised to the wife during coverture, and not reduced to the husband's possession, otherwise than in his right of executor of the devisor, survived to his wife. So, in a subsequent case, (2 Hen. & Munf. 381,) the principle was fully recognized that, on the death of the husband during the existence of a particular estate in slaves, the remainder, to which the wife was entitled in her right during coverture, survived to her."

In the case of *Upshan v. Upshan et al.*, Judge Tucker said: "True it is, William Upshan, by his codicil, gave the appellees what he had no power to *bequeath*, his wife's interest in the dower slaves held by her mother, being merely a reversionary interest, which, in the event of her surviving her husband, without his disposing thereof in his life-time, or reducing the slaves into possession, would survive to her. But it is clear from the words of the codicil, that he thought the slaves were *his own*, and that he had a power to bequeath them by his will. This was clearly a misconception of his right in respect to them; for, though he might have *sold* his wife's reversionary interest, it being a vested interest, yet, if he neglected so to do, he could not dispose of it by will, but it would survive to her."

I confess that there appears to me an absurdity in this opinion of Judge Tucker. Here, the wife's interest in slaves belonging to her mother, in right of dower, is said to be her reversionary interest, but, at the same time, a vested interest. The wife and husband could not, by any process at law or equity, during the life of the mother, have reduced these negroes into their possession. They had no right to the negroes which could be enforced by taking them out of the possession of the real owner for the time being, that is, the mother. The husband could not sell them, so as to deprive his wife of the right of survivorship; nor could husband and wife sell them, so as to deprive her of her right of survivorship by any principles known to the common law; for a tenant for life had

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the possession of them. The husband, in the nature of things, could not have reduced them into possession, and all he could have sold would be his right to reduce them into possession after the expiration of the estate for life, and his assignee could have obtained, by such sale, no other or further right than the husband had. Did or could such a sale by the husband change this property of the wife and reduce it to possession? Was it not still a *chose in action* after such a sale? Could the assignee of the husband have reduced it from a *chose in action* to a *chose in possession*?

I know that there are legal fictions, and upon one of these fictions is grounded the distinction that a *chose in action*, accruing to the wife during coverture, vests, at once, in her husband, because she and her husband are one person in law, and all such *choses in action*, thus accruing during coverture, are vested at once in the husband, because she is merged in him; but *choses in action*, at the marriage, are not thus vested at once, but must be reduced into possession. (*Griswold v. Penniman*, 2 Conn. Rep. 566.)

In the recent case of *Browning v. Headly*, (2 Rob. Rep. 340,) the rule laid down by Sir Thomas Plumer, in *Purdew v. Jackson*, which rule was afterwards confirmed by Lord Lyndhurst, in *Honner v. Morton*, (3 Russ. Rep. 65,) that, where a husband assigns personal property, in which his wife has a reversionary interest, expectant on the death of the tenant for life, and the wife and tenant for life both outlive the husband, the wife is entitled by survivorship, in preference to the assignee, is recognized as sound by Judge Allen.

This case also recognizes the doctrine of the English chancery that, where an absolute equitable interest is given to the wife, the court will not permit the husband to recover it, without making provision for the wife, and that the husband's assignee, whether general or particular, takes his interest, subject to the same equity. In this case also, the doctrine of "vested interest" is still kept up, and the husband's assignment of the wife's interest or share in her father's estate, before the execu-

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tors assent to pay any portion of it, is held good against the wife in favor of the husband's assignee. The Judge says : " I consider the interest of the wife in her father's estate, at the time of the assignment, as a *present interest, susceptible of being* reduced into possession ; and that the assignment was a special assignment for value, and therefore that she could not take by survivorship." Allen, Judge. Stanard, J. : " I concur that the assignee from the husband, for valuable consideration, of a present (as distinguished from a reversionary) interest of the wife, has a valid title against the wife, though she survives her husband." This assignee, however, got nothing ; for, under the practice of the courts of the English chancery, the husband and his assignee must make a reasonable provision for the wife, and the court gave the whole of the wife's share to her as a reasonable provision. Judge Allen says : " The wife's interest was susceptible of being reduced into possession, and being a present interest, the assignee must hold." Judge Stanard agrees, because the wife's interest is a present interest, contradistinguishable from a reversionary interest. We may therefore conclude that, under the rule of the English chancery, and the principles of *Purdew v. Jackson*, and *Honner v. Morton*, the sale by the husband of his wife's interest in the slaves held by her mother in dower, the mother and wife both outliving the husband, will be subject to the wife's right of survivorship, should the case ever occur in Virginia. The husband, in our law, has no right to administer upon his wife's estate, and take her estate for his own benefit, as husband. He must reduce his wife's *choses in action* in her life-time, and thereby become possessed of the same in his own right, or he will afterwards, as administrator, if he recovers them, be liable to account to her next of kin for the same. In the case from 4 Rawle's Rep. 468, it was held that a deed from a husband conveying the wife's *choses in action* to trustees for the benefit of the wife and child, though not a reduction of such *choses in action* into possession, nevertheless passes not only the interest of the husband, but that of the wife also to the trustees,

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upon the trusts declared in the deed. Consequently, upon the death of the husband, such *choses in action* do not survive to the wife, so as to entitle a second husband to claim them as her property. Chief Justice Gibson, after stating the objection to this settlement, rested on a former decision of their court, requiring a valuable consideration for the contract of equitable assignment, in order to bar the wife's survivorship, asks the question, "Would a chancellor withhold his assistance from what this palpably is, a settlement for the advantage of the wife herself, and in restraint of the husband's power to squander the fragments of her estate?" He continues: "This is a reasonable settlement out of the wife's own property, on herself and child; and it would be a narrow construction of the marital powers of the husband, that would suffer the trust to fail for an omission to reduce the fund into actual possession, before the execution of the instrument." The balance of the opinion of this learned judge, is outside of the case; it was obviously prepared to shake the authority of the decisions of English chancellors and Masters of the Rolls, in the cases of *Purdew v. Jackson*, *Hornsby v. Lee*, and *Honner v. Morton*. I am still satisfied with the decisions of those cases, and consider them best calculated to protect the wife and children—the very thing that Chief Justice Gibson was doing in this case—for which he had to condemn the narrow policy which required the husband to reduce into possession the wife's *choses in action*, before he could dispose of them so as to cut off the wife's right of survivorship. It is admitted that this conveyance of the husband was not a reduction into possession. Then the law will not give him power to dispose of the wife's *choses in action*, not reduced into his possession during coverture, so as to bar her right of survivorship. All the reasoning on this subject, when not founded on the principles of the law concerning the husband's authority over his wife's *choses in action*, however ingenious, must give way before the solid learning and plain common-sense view of the modern English chancery cases on the same subject.

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I have not deemed it necessary to review all the cases cited by the counsel for the parties in this case. Upon an examination of them, my mind has come to the conclusion, without a doubt, that the deed of the husband and wife in this case has not the power, under the circumstances of the case, to bar the wife's right of survivorship. I am also equally well satisfied that, if the deed had that effect as an assignment from the husband and wife to a particular assignee for value, yet that such assignee must make reasonable provision for the wife, and would take the *choses in action* liable to this provision for the wife. Here, the husband and wife, by deed, sold the wife's interest in the dower estate of the wife's mother. The mother was still living after this sale, and before the mother's death the plaintiff obtained a sentence of divorce from her husband. The mother died after this divorce. Now, it is plainly to be seen that, if this divorce operates as the death of the husband would, then this *chose in action* never was capable of being reduced in his life-time into his possession. The mother, the tenant for life, had the sole and exclusive right of possession, and had also the actual possession, until after the civil death of the husband of her daughter. Then, the husband, during his life, being unable to reduce this property of his wife into actual possession, shall his deed to his assignee have the effect of making such actual possession in him? His assignment of a *chose in action*, which could immediately be reduced into possession, may be considered as a constructive reduction into possession, because that immediately follows, the property is changed, and the wife's right divested. But where neither the wife nor husband, nor their assignee, have the power to reduce into possession the *choses* of the wife, until an event must take place in future, we think that it would be absurd to say that, in such a case, the assignment of husband and wife, for value, did reduce such *chose in action* into possession; and the assignee would take it, were the husband to die before the happening of such future event, freed from the wife's right of survivorship. To call the assignment, in this case, a constructive

reduction into possession—a possession in some sense—tantamount to possession is to suppose two things to be the same which are directly opposite to each other; it is to suppose a *a chose in action* to be a thing constructively reduced into possession; it cannot be both; no construction can make things opposite in their nature to be the same things.

Wherever such assignments have been considered reduction into possession, the *choses* assigned were capable of being immediately possessed; there was an immediate right of possession, which was or could be soon completed or followed by actual possession, (as a judgment, but before execution;) in these, the property may be considered as changed, and the condition substantially fulfilled. Sir Thomas Plumer's opinion, in *Purdew v. Jackson*, (p. 70 :) "The wife's reversionary interest is incapable, in this case, of being reduced into the possession of the husband, until the death of the tenant for life; the death, then, of the husband happening before the death of the tenant for life, his previous assignment cannot affect the wife's right as survivor."

We do not consider this reversionary interest in the wife as a vested present interest in possession, neither in her nor in her husband; and we think the authorities amply sustain us in this opinion, notwithstanding the Virginia decisions to the contrary. We cannot see how, if the reversionary interest of the wife in the slaves belonging to her mother, as her dower property, be a vested present interest in her husband, so that he can sell it, and destroy thereby the wife's survivorship, why he cannot will it away, and destroy her right by will. If he were to reduce her *choses in action* into his possession, he might will them away, because they become his absolutely by such reduction; the property becomes changed by being turned into his possession. He can will away such property; why not will away a present vested interest in him to his wife's reversionary interest? Is it because this interest ceases at his death, and being no will until his death, when it becomes a will, there is no interest for it to operate on? And yet he can sell, and after his

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death, the assignee will hold against his wife's right of survivorship, though the particular estate did not end until after her husband's death! But I will pursue this subject no further, being satisfied that the law is with the plaintiff in this case.

There now remains but one further question, which is, whether the plaintiff's petition states sufficient facts to warrant the judgment of the court below.

The plaintiff's petition shows that all the property which was given to her by way of advancement, and all which she got from her father's estate has been squandered by her husband; that she is left alone, with several small children, to depend upon her own personal labor for a support; that the defendant, Simmons, has, by some means or other, got several of the slaves which came to her from her father's estate; and that he will endeavor to get the remainder of her estate, which comes to her from her mother's death, out of her mother's dower; that, before her mother's death, she was divorced from her husband; that Simmons claims this property under the contract made by her husband and herself, before she was entitled to have the interest in her mother's dower estate. We are satisfied the petition states grounds sufficient for the interference of the court below, and that, in right and justice, the defendant should be prohibited and restrained from interfering with the fragments of the estate of this poor woman.

Upon the whole case, we are satisfied the law has been properly declared, and the judgment of the court below is affirmed; Judge Scott concurring. Judge Leonard was not on the bench when this cause was argued.

THE CHOUTEAU SPRING COMPANY, Respondent, *vs.* HARRIS,
Appellant.

The charter of an incorporated company provided that the stock might be "transferred on the books of the company." The company was authorized "to regulate the transfer of stock" by by-laws. A provision in the charter authorized the company, in certain cases, to make assessments on "stockholders," beyond their shares of stock. *Held:*

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1. That no such assessment could be made on a party after he had ceased to be a member, by a transfer of his stock.
2. That the power "to regulate the transfer" did not include the power to *restrain* transfers or prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them; and that the company could not prevent a party from selling his stock even to an insolvent person.
3. That an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws.

Appeal from Cooper Circuit Court.

This was an action commenced before a justice of the peace to recover the amount of an assessment made against Harris as a stockholder in the Chouteau Spring company, under the 12th section of their charter. (Sess. Acts, 1849, p. 168.)

At the trial in the Circuit Court, upon appeal, it appeared in evidence that in August, 1851, Marcus Williams assigned nine shares of stock to the defendant, on the books of the company, and the treasurer issued a new stock certificate to the defendant. Afterwards, in October, 1852, the company being indebted to an amount exceeding their corporate property, a meeting was called and an assessment made upon the stockholders to pay off a portion of the debt.

Several months before this meeting was held, defendant came into the office, and wrote on the books of the company an assignment of his stock to William J. Pettit. Some days afterwards, defendant went to the office with Pettit, produced his stock certificate, and requested the treasurer to cancel it, and issue another to Pettit. The treasurer refused to do this, assigning as a reason that the company was in debt beyond its assets and Pettit was insolvent. It was in evidence that there were other instances where the treasurer had refused to allow members to transfer their stock to insolvent persons. The certificate had upon its face the words "transferable only on the books of the company in person or by attorney."

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The defendant read in evidence an assignment to Pettit, written on a separate piece of paper, and dated June 22, 1852. He also read the charter and by-laws of the company. The tenth section of the charter is as follows :

§10. The stock of said company shall be deemed personal property, and may be transferred on the books of said company; and transfers of certificates of stock may be made in such manner as the company may by law direct.

The twelfth section authorizes the company to make assessments "on stockholders" for raising funds required by the company for purposes of improvement or purchasing lands; provided that all assessments shall be equal, and never exceed in any one year fifty per cent. upon each share.

The by-laws of the company contained no provision whatever in relation to transfers of stock.

The court instructed the jury to find for the plaintiff, if the defendant was the owner of the stock when the assessment was made, and then instructed them that there was no legal evidence that he was not the owner. All the instructions asked by the defendant were refused, and there was a verdict and judgment for the plaintiff.

Gardenhire and Draffin, for appellant. 1. The defendant had a right to sell and transfer his stock upon the books of the company, and a court would compel the treasurer to issue a certificate to the assignee. (8 Pick. 90. 16 Mass. Rep. 94. Ang. & Ames on Corp. p. 436-37, §1, and p. 439, §3.) 2. The defendant was not liable to be sued by the company for an assessment made three months' after he had transferred his stock to Pettit. (7 Term Rep. 36. Ang. & Ames, 426-7, §8.) 3. The company can only assess stockholders, and not those who have ceased to be stockholders. (Acts of 1849, p. 170, §12.)

J. W. Morrow, for respondent, argued that it was a fraud upon the other members and the creditors of the corporation for a stockholder to transfer his stock to an insolvent person, for the purpose of escaping liability to an assessment for

debts created for the purposes named in the twelfth section of the charter.

Hayden & Stephens, on the same side, insisted in their brief that the evidence and the instructions in relation to a transfer of the stock before the assessment were wholly immaterial; that the only question was, whether the *debt*, to pay which the assessment was made, was contracted during the defendant's ownership of the stock or not; and that, as this was not denied, the defendant had no right to complain, and the judgment ought not to be disturbed.

LEONARD, Judge, delivered the opinion of the court.

The question here is, in relation to the correctness of the direction given by the Circuit Court to the jury. The suit was to recover an assessment made on the defendant as a stockholder, pursuant to the twelfth section of the charter, (Sess. Acts, 1849, p. 168,) and the matter litigated at the trial, whether the defendant had so parted with his stock before the assessment as to relieve him from personal responsibility.

It seems to have been assumed in the Circuit Court, that the company's right to recover depended on the fact that the defendant was the owner of the stock at the time the assessment was made, and although it has been argued otherwise here in one of the briefs, we can see no other ground on which the recovery can stand. The power to make the assessment is derived exclusively from the charter, and has that extent and no other which is there given to it. The words of the charter are: "The company shall have power to make an assessment upon such stockholders, for raising funds required by the company for purposes of improvement or purchasing lands, in such amount as they may deem proper; provided, however, that all assessments shall be equal, and never exceed in any one year fifty per cent. on each share."

1. Of course, the legislature never contemplated giving this company power to govern any except its own members, and the authority to levy assessments is therefore confined to stock-

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holders, and is expressly limited to fifty per cent. a year on each share. Any other construction would be unreasonable and could not be admitted. In this, as in most joint stock companies, member and stockholder are convertible terms—a person cannot be one without also being the other. In the *Overseers of the Poor, of Boston*, against *Sears*, (22 Pick. 131,) Shaw, Chief Justice, says: “In all *quasi* corporations, as cities, towns, parishes, school districts, membership is constituted by living within certain limits. In all bridge, railroad, and turnpike companies, and generally in all corporations having a capital stock and looking to profit, membership is constituted by a transfer according to the by-laws, without any election on the part of the corporation itself. In some, the assent of the corporation is made necessary to such transfer and consequent ownership.”

It is clear that, under this charter, an assessment can only be laid upon one who is a stockowner at the time; nor is there any hardship in this, either to the corporate creditors or to the individual members of the company. This is not a private joint stock company, where there is a personal responsibility upon all the partners for all the debts, without any limit, and a mutual responsibility to each other to contribute to the common burthens, from which none can escape by selling out; but a corporation, the distinguishing feature of which is the personal irresponsibility of its members for the company debts beyond their shares of stock, and the individual responsibility provided by statute against the members, in case of insolvency, to double the amount of each member's stock, for debts contracted during his ownership. The credit, in the one case, is given to the individuals composing the association; in the other, to the corporation, on the faith of its corporate property, and this special statute personal responsibility. Certainly it was most honorable in the members of this company that, instead of abandoning the concern as insolvent to its creditors, to make what they could out of it, they voluntarily imposed an assessment upon themselves to discharge this indebtedness; but this court cannot, for

that reason, or for any purpose, no matter how laudable, disregard the plain law of the land, and subject to this assessment those over whom the company had no authority.

2. Returning, then, to the only question in the case, whether there was any evidence that the defendant had parted with his stock before the assessment was made, the jury were told that there was no such evidence, and the questions discussed at the trial, in order to settle this matter, seem to have been, whether the company could prevent a transfer of stock, by withholding its consent on account of the insolvency of the assignee, and if they could not, whether the present transfer was made with the necessary formalities to effect a change of ownership.

There was evidence that the defendant had made a written assignment of his stock to Mr. Pettit, on a separate paper; that the parties afterwards went to the company's office, where the defendant wrote an assignment on the stock transfer book of the company, handed to him by the company's officer; that a few days after this, the parties went again to cancel the old certificate, and take out a new one in the name of the assignee, which the officer refused, on the alleged ground that the company was in debt beyond its means, and the assignee insolvent. It was also in evidence that no by-law had ever been made regulating the transfer of stock, although the certificates bore on their face the words, "transferable on the books of the company;" that the assignee was insolvent, and that the company's officer had, on previous occasions, refused to recognize the validity of assignments to insolvent persons.

Stock, in incorporated joint stock companies like the present, is always treated as property, without any declaration in the charter to that effect; and when such a provision is inserted, it is considered as merely cumulative, except so far as it designates the peculiar character of the property, whether real or personal. One of the incidents of property is its transferability, our idea of property, dominion over a thing, including in it the power of disposing of it at pleasure; and, of course, the power of disposing of this stock, like the power of dispo-

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sing of any other property, is incident of common right to the ownership of it; and the words in the charter, "transferable on the books of the company," are treated as merely cumulative, pointing out one mode of transfer, but not excluding other modes, where no exclusive words are used. The legislature may grant corporate power to restrain this transferability, but unless it is expressly given, it does not exist; and in favor of the power of disposing, the courts generally construe clauses affecting this right with a view to the particular purpose for which they are inserted, and give them effect to that extent only. (*Bank of Utica v. Smally*, 2 Cow. Rep. 712. *Quiner v. Marblehead Soc. Ins. Co.*, 10 Mass. 476.)

We remark here that the power of regulating the transfer of stock is, at least under our laws, (R. C. 1845, tit. "Corporations," art. 1, sec. 1,) incident of common right to every corporation; and although the power in the present charter is expressed in language somewhat different from that used in the general act, it must receive the same construction. This power, however, of regulating transfers of stock, confers no corporate authority to control its transferability by prescribing to whom the owner may sell, and to whom not, or upon what terms. (The truth is, the provision is considered as being intended exclusively for the benefit of the company, in order that they may, by proper regulations, provide themselves with the means of knowing who they are bound to treat as members liable to assessment and entitled to vote at corporate meetings and to receive dividends, and it is construed accordingly, the corporation being left to exercise the power or not, at its own pleasure, as being alone interested in the matter.

If any authority is needed in support of what is here said, we may refer to two cases—one in Massachusetts, (*Sargent et al. v. Franklin Ins. Co.*, 8 Pick. 90,) and the other in New York, (*Bates v. New York Ins. Co.*, 3 John. Cases, 238.) These are cases against the companies by the assignees of stock assigned, but not allowed by the companies to be entered upon their books, and the doctrine laid down is, that although

the company have the power of regulating the transfer of stock, by prescribing the mode in which it shall be made, the transfer is valid as against the company, if they have notice of it and refuse to allow it the necessary formalities; and that they cannot withhold these formalities upon the ground that the assignor is in debt to the company. In the Massachusetts case, a general power to regulate this matter was given in the charter, and the New York company exercised the power under the general law, which, in this particular, is believed to be the same as our own. In the case in Pickering, to which we have referred, the court, in reference to the objection that the assignors of the stock were indebted to the company, and that therefore the company was not obliged to admit a transfer of their shares until their debt was paid, say: "We do not know on what ground that argument can rest, better than that which is suggested, that the assent of the president is to be required to prevent transfers which are injurious to the corporation, and that a power of assenting implies a power of refusing. No authority is cited in support of that position. In *Bates v. New York Ins. Co.*, (3 John. Cas. 238,) a similar claim was rejected. The company refused, unless the assignee would pay the debts due from the assignor, and the assignee, who paid under those circumstances, was permitted to recover back the money, on the ground that the corporation had no right to require such payment." In another part of the opinion, the court say: "A by-law which limits the transfer of the stock to be made only at the office personally, or by attorney, and with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways. The purchaser or other person entitled should make his right known to the corporation, that it may be entered upon their books, to the end that they may have proper evidence to whom the dividends or profits should be paid."

Upon a sale of stock under our execution laws, (R. C. 1845,

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tit. "Execution," secs. 14 and 48,) it is the duty of the officer to give notice to the company of the sale, and it is then as complete against the company as if clothed with the required formality prescribed by the by-laws.

3. The other matter which seems to have been considered in the Circuit Court, whether the assignment was sufficient to effect a change of ownership without taking out a new certificate in the name of the assignee, is settled by what has been already said. By the very words of the charter, the stock is "transferable on the books of the company," and even if the words are to be construed as excluding all other modes of effecting a complete transfer, the mode prescribed by the act must be sufficient, without any additional formality, and there was proof to go to the jury of such a transfer. But we do not wish to be understood as putting the case upon this narrow ground. An assignment in writing is sufficient between the parties; and if it be notified to the company, and they will not allow it to be made according to their by-laws, it is as valid against them as if the required formalities had been observed, the courts acting on the principle, as between these parties, of considering that done which ought to have been done, and settling the rights of the parties accordingly.)

We remark, in conclusion, that a stockholder cannot, by selling out against the company's consent, escape from his responsibility to the company for the unpaid purchase money of stock taken; nor can a member of a company, by a fraudulent conveyance, avoid his statute liability to the corporate creditors for debts contracted during his real ownership. These are matters not involved in this record, and left untouched by this opinion.

The result is, the Circuit Court misdirected the jury as to the law applicable to the case, and the judgment must be reversed, and the cause remanded for a new trial; and the other judges concurring, it is ordered accordingly.

MARTIN'S EXECUTORS, Appellants, vs. MILLER, Respondent.

1. In an action on the case begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire, which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully* and *negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all.

Appeal from Andrew Circuit Court.

This was an action on the case commenced in 1847. The declaration contained two counts. The first count alleged that, on the 28th day of March, 1847, the defendant "wrongfully and unjustly" set fire to prairie grass on or near his land, and that the fire extended to the land of the plaintiff and burned his fence. The second count was substantially the same, except that it charged that the defendant "wrongfully, *negligently* and unjustly" set out the fire. The facts in proof appear in the opinion of the court when the cause was formerly here. (16 Mo. Rep. 508.) It was in evidence that the defendant set out the fire on *Sunday*, the 28th of March, 1847. Among other instructions, upon which no question is here made, the jury were directed that it was immaterial to the issues whether the fire was set out on *Sunday* or not.

Gardenhire, for appellant. 1. It was matter of judicial notice that the 28th of March, 1847, was Sunday, and it was not necessary to expressly charge it in the declaration. (1 Chitty's Plead. 249.) But if it was necessary, there was no demurrer to the first count. 2. It is well settled that, if a party be engaged in an unlawful act, he is responsible to all persons for injuries resulting from it, without any fault of their's. (1 Chitty's Plead. 145, 148. 2 Pick. 623. 1 Cowen, 78. 6 Cowen, 191.)

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Hall and Vories, for respondent. 1. Under a declaration for *negligently* setting out the fire, the plaintiff could not recover for the unlawful setting out fire on *Sunday*. (1 Chitt. Plead. 267, 244, 409. 9 Barb. S. C. Rep. 158. 18 Mo. Rep. 403. 3 Watts, 255. 1 Stark. Ev. 372, 374.) It was not a material averment that the day upon which the fire was set out was March 28th. Proof of any other day would have enabled the plaintiff to recover. 2. It does not follow that because it is unlawful to labor on Sunday, the plaintiff can recover damages in a civil action for a violation of the statute.

SCOTT, Judge, delivered the opinion of the court.

This case was formerly here, and is reported in the 16 Mo. Rep. 508. The only question now presented for our determination is, whether, if the defendant fired his land on Sunday, he was not a wrong doer, and liable for all damages resulting from his illegal act.

It will be borne in mind that the declaration is at common law, (this action having been commenced in October, 1847,) and for damages resulting from the act of firing the defendant's land, from which the fire escaped and burned the rails and fence of the plaintiff. The act is alleged to have been done on the 28th day of March, 1847, which was Sunday.

1. It was argued for the appellant, that the almanac is a part of the law of the land, and that the court will consequently take notice that the 28th day of March, 1847, was Sunday, and being such day, the act of firing his land by the defendant was illegal, and he is liable for all damages flowing from it.

One test by which the materiality of the averment that the kindling the fire was on the 28th of March, 1847, may be ascertained, is to suppose a plea filed to the declaration denying that the fire was kindled on that day. Such a plea would be obviously bad, as it would contain a negative pregnant. The action brought is for negligently keeping fire set out on his land by the defendant. Under this declaration, the plaintiff cannot

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try whether the defendant did unlawfully set fire to his land on Sunday, and thereby injure the plaintiff. Had the action been for illegally kindling the fire on Sunday, the declaration should have been framed under the section of the statute prohibiting labor on that day, and have negatived the exceptions therein contained. The declaration in this case is clearly bad as a declaration under that section of the statute.

It will not be necessary to cite authority to show that, under a declaration for one cause of action, another and a different cause of action cannot be tried.

Judge Ryland concurring, the judgment will be affirmed.

THE STATE, Appellant, vs. RICH & RICH, Respondents.

1. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends.
2. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county.

Appeal from Lawrence Circuit Court.

John W. and John Rich were indicted in the Circuit Court of Stone county, at the June term, 1853, for an assault. Upon their motion, the cause was subsequently removed by change of venue to the Circuit Court of Lawrence county. They there moved to quash the indictment, assigning as a reason that the law establishing the county of Stone was unconstitutional, because its effect was, to reduce the population of Taney county below the legal ratio of representation. At the hearing, the circuit attorney admitted that such was the effect of the law, and thereupon, the court sustained the motion and quashed the indictment. The circuit attorney, on behalf of the state, appealed to this court. The cause was submitted without oral argument.

Gardenhire, (attorney general,) for the State. The case

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of *The State v. Scott*, 17 Mo. Rep. 531,) and *The State v. Gates*, to be decided at the present term, will decide this case. There was no brief for the respondents.

LEONARD, Judge, delivered the opinion of the court.

This judgment must be reversed, and the cause remanded, to be proceeded in to a final trial and determination.

The ground of the motion to quash the indictment was, that the act of the general assembly establishing the county of Stone, (Sess. Acts, 1851, p. 186,) where the indictment was found, was unconstitutional, because the establishment of this county had the effect of reducing the old county, (Taney,) from which it was taken, below the ratio of representation then required; that, therefore, Stone county was not constitutionally established, and that, of course, there was, in point of law, no such court constituted as the Stone Circuit Court, where an indictment could be lawfully found; or, in other words, that there was no case lawfully in the Lawrence Circuit Court, which that court could proceed to try and determine. The circuit attorney admitted the alleged fact, and upon this admission, the court decided that the act of the general assembly referred to was contrary to the state constitution, and that, consequently, the Stone Circuit Court not being lawfully constituted, the indictment was a nullity, and must be quashed.

1. The invalidity of this act does not, as is usually the case, appear upon the face of the statute; it is impossible, therefore, to determine, from a comparison of the act with the constitution, that there is any conflict between them.

The old statute of this state, establishing loan offices, was declared to be a violation of the federal constitution, because it appeared upon the face of it that the paper certificates which it authorized to be issued were "bills of credit," within the meaning of that instrument; but here, the alleged nullity depends upon an extraneous fact, that may or may not be true, *that the erection of the new county left the old county with a population less than the existing ratio of representation*

required. A knowledge of the law is imputed to the courts of justice, and so *nul tiel record* cannot be pleaded to a public statute. (6 Bac. Abr. Stat., p. 394.) But the appeal is to the judges, who are supposed to know the law, and if the courts are to pass upon the validity of a legislative act, impeached on the ground that what it directs to be done produces an effect not allowed by the constitution, they must, of necessity, determine for themselves, in some way, the existence or non-existence of this fact. How they are to ascertain it, we need not stop here to inquire. It was the duty of the legislature to determine the matter for themselves, before passing the act, and a proper respect for a co-ordinate branch of the government requires us to presume that they did make the inquiry, and found that no such consequence would result; and this presumption must stand at least until our consciences are satisfied, in some proper manner, that the fact was otherwise. In this case, there was no inquiry by the court into the fact suggested by the defendant; but upon the mere admission of the circuit attorney, the presumption in favor of the validity of a legislative act is repelled—the non-existence of the requisite population taken as true, and a public prosecution for a high offence, a matter in which the whole state was interested, suppressed, and the alleged criminal left to go unpunished. This cannot be. Although we, of course, impute no intentional error to the public officer who conducted the prosecution, it is manifest that it was not proper for him to make such an admission; nor indeed, was it proper for the court to allow it to be done, or to allow it, when made, to satisfy its conscience of the fact, so as to justify it in refusing to proceed in the trial of the cause.

2. This view of the matter is sufficient to produce a reversal of the judgment; but as the point is in the case, we propose to go farther, and declare that this inquiry cannot be gone into collaterally, on the trial of this cause, with a view to treat the indictment as a nullity. Whether there is any method, under our existing laws, of instituting an inquiry into the validity of a legislative act alleged to be void upon the ground now sug-

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gested, we are not here called upon to decide ; but however this may be, we think such a proceeding must be a direct proceeding for that purpose, so that the judgment of the court may operate, as it were, *in rem*, and have the direct effect of settling the question permanently, in such manner that it cannot afterwards be made the subject of judicial investigation. Any other course would, it seems to us, be impracticable, and if practicable, full of intolerable inconveniences, and against all reason. The law is intended for practical use, and we may pause a moment to observe the working of any other course of decision upon the business of men and the interests of the community. By the act establishing this county, a local government is erected over the district of country embraced within its limits, and the necessary judicial tribunals and other offices are provided to carry on the government of the state in that locality. Among the first acts necessary to put the law into operation, is the appointment of the proper officers by the governor. He is required to act—the law imposes the duty upon him—there is nothing appearing on the face of the act itself that conflicts with the constitution, and he has no authority to institute any inquiry into the matter which is alleged to constitute its invalidity. The judges, too, are directed to hold their courts, and transact the business that is brought before them ; and they, too, like all others, must presume that the law is constitutional, until it is made to appear otherwise, and cannot themselves go into a judicial investigation of the question, without involving the absurdity of allowing a court so established to be a lawful tribunal for the purpose of adjudging itself to be a nullity. Civil suits and public prosecutions are instituted in these courts, and judgments are rendered affecting the lives and persons and property of individuals, and, after the lapse of years, all these things, whenever questioned collaterally, are to be adjudged void—the evil could not be endured.

It would, indeed, be impracticable to act upon any such principle. If, whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law

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could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact, upon which the validity of the contested legislative act depended, should be first tried and determined upon testimony, which, being different in different cases, might involve the absurdity of deciding the law constitutional one day, and unconstitutional the next. But we need not press these things farther; the result is manifest; all such inquiries must be excluded whenever they come up collaterally, and the county, its courts and officers, must be treated as things existing in fact, the lawfulness of which cannot be questioned, unless in a direct proceeding for that purpose.

We do not mean to raise any doubt as to the correctness of the proposition of law in the case of the *State ex rel. Douglass* against *Scott*, decided at the January term, 1853, of this court, (17 Mo. Rep. 521,) that "the legislature cannot lawfully reduce an old county, by the establishment of new counties, below the ratio of representation then required;" but only to say that the invalidity of the law cannot be drawn in question in the present proceeding, either upon the admission of the fact, or upon an inquiry into its truth.

The other judges concurring, the judgment is reversed, and the cause remanded.

THE STATE, Respondent, vs. UPTON, Appellant.

1. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict.
2. Jurors are the exclusive judges of the weight of testimony.
3. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute.

Appeal from Ripley Circuit Court.

J. W. Morrow, for appellant, among other points, relied upon the following: 1. The instruction given below that the

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jury were bound to take the testimony of a witness as true, unless impeached, is manifestly wrong. 2. The verdict is fatally defective, in not specifying the degree of the offence of which the defendant was found guilty. (R. C. 1845, p. 883, art. 7, sec. 1. 8 Mo. Rep. 495.) 3. The use of intoxicating liquor by the jury in their retirement avoids the verdict. (*Brant v. Fowler*, 7 Cowen, 562. *The People v. Douglass*, 4 Cowen, 23.)

Gardenhire, (attorney general,) submitted the case for the State.

SCOTT, Judge, delivered the opinion of the court.

John Upton was, at the September term, 1853, of the Circuit Court of Ripley county, indicted for murder in the first degree, and was subsequently tried and convicted.

There was a motion for a new trial and in arrest of judgment, both of which were overruled, and the cause was brought here by appeal.

One of the grounds for a new trial was, that the jury, in their retirement, used intoxicating liquors. Another ground was, the misdirection of the court in point of law, in giving the following instruction: "That the testimony of a witness given upon the stand will be taken as true, unless such witness be impeached."

The motion in arrest was founded on the omission in the verdict to state the degree of murder of which the defendant was found guilty. The verdict was: "We, the jury, find the defendant guilty in manner and form as charged in said indictment."

1. In consequence of the want of conveniences for holding the sessions of the courts in many counties of the state, we have never lent a willing ear to objections against verdicts growing out of irregularities in the conduct of jurors, unless such irregularities affected the verdict, or were induced by means employed by the party obtaining it. Whilst the conduct of jurors cannot be too narrowly watched by the courts, yet, if they do

misbehave, if it cannot be seen that such misbehavior affected the verdict, it has been thought best, under all the circumstances, to leave such misbehavior to the reprehension of the courts and the punishment imposed by law for it, without disturbing the verdict. No court would be warranted in receiving a verdict against a prisoner from a jury, any member of which was in the least under the influence of intoxicating liquors. But to hold that a verdict should be set aside for the use of ardent spirits by the jury, not carried to an excess, when such spirits are not supplied from a source interested, or calculated to bias the minds of the jurors, would be establishing a rule which would result in no practical good, and prove very burdensome to the parties. The setting aside of their verdicts is no punishment to jurors. They scarcely regard it as a reprimand, and to destroy their verdicts, for a cause which does not appear to have affected them, would be visiting the innocent with the consequence of the misdeeds of others. The use of intoxicating drinks by jurors, whilst in the discharge of their duties, should be discountenanced, and they should be taught that such conduct will not escape reprehension; but the propriety of setting aside their verdicts for such cause is by no means apparent.

2. The instruction given by the court is erroneous. Courts always err; when they attempt to lay down rules by which a jury should be governed in estimating the weight to be given to the evidence of witnesses examined before them. That is a matter to be determined exclusively by themselves. They hear the witness and see his deportment, and from these circumstances, they determine, for themselves and by themselves, the confidence they will repose in his testimony. Where courts are permitted to sum up or comment upon the evidence, it is usual to express an opinion as to the weight to be given to the testimony of a witness; but as that is not allowed here, in criminal proceedings, (R. C. 1845, p. 882,) the court should not attempt, by an instruction, to determine for a jury the weight to be given to the evidence. They should only direct the jury that,

viewing all the testimony before them, and the conduct of the witnesses, they are the sole judges of the credibility of all those who testify before them.

3. The case of the *State v. McGee*, (8 Mo. Rep. 495,) is in point as to the defect of the verdict in not stating the degree of the offence of which the prisoner was found guilty, and shows that such defect is fatal. The statute is imperative (R. C. 1845, art. 7, sec. 1, of the act respecting proceedings in criminal cases,) that, upon the trial of any indictment for any offence, where, by law, there may be conviction of different degrees of such offence, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offence they find the defendant guilty. There may be murder in the second degree, and under an indictment for murder in the first degree, a party may be convicted for murder in the second degree. Then, as the appellant was indicted for murder in the first degree, and as the jury has failed to find in what degree he is guilty, under an indictment on which he could be convicted either of murder in the first or second degree, their verdict does not enable the court to pronounce the sentence of the law upon it, and, therefore, it is erroneous. (R. C. 1845, art. 2, sec. 2, tit. "Act concerning Crimes and their Punishments," and art. 9, sec. 14, same act.) The other judges concur in reversing the judgment, and remanding the cause.

THE STATE, Respondent, vs. GATES, Appellant.

1. A second change of venue may be granted where the judge has been counsel in the cause, notwithstanding the twenty-eighth section of article five of the act concerning practice and proceedings in criminal cases. (R. C. 1845.)
2. A party objecting to the admission of a record in evidence must specify his objections.
3. One witness swearing that he saw two men on horseback meet in a road, and that they wheeled as they passed and had an angry conversation, and another witness, who also saw them meet, swearing that he did not see them wheel, an instruction to the jury that affirmative must prevail over negative testimony was held inapplicable and erroneous.

Appeal from Camden Circuit Court.

Gates was indicted at the October term term, 1848, of the Morgan Circuit Court, for attempting to deter a witness from giving evidence upon an indictment against him for perjury. At the April term, 1849, on account of the alleged prejudice of the judge, a change of venue was awarded to the Benton Circuit Court. A trial was had and the defendant convicted. He appealed to the Supreme Court and the case was reversed and remanded. In 1851, the cause was sent to Camden county by order of the court, because the then judge of the Benton Circuit Court had been prosecuting attorney in the cause. At the April term, 1852, the appellant took a continuance, and entered into recognizance for his appearance at the next term. At the October term, 1852, he filed a motion to strike the case from the docket and remand it to the Benton Circuit Court, because the court had no jurisdiction, a change of venue having once before been granted. The motion was overruled and the appellant excepted. He was then tried and convicted, and appealed to this court. At the trial, the defendant objected to the record of the Moniteau Circuit Court in the case in which he was alleged to have attempted to deter a witness from testifying, and to the record of the Benton Circuit Court in this case, but the record does not show that he specified his objections. His objection was overruled, and the records were read in evidence.

Among others, the court below gave the instruction, which, together with the testimony applicable to it, is set out in the opinion of Judge Ryland.

Wright and Parsons, for appellant. 1. The court erred in overruling the motion to strike the cause from the docket and remand the same to the Benton Circuit Court, one change of venue having previously been taken. (R. C. 1845, p. 876, sec. 28.) 2. The court erred in permitting the transcript of the record from Benton Circuit Court to be read in evidence. It was improper to tell the jury by the record what former juries

had done. 3. The court erred in giving the second instruction. It was the peculiar province of the jury to determine what weight they would give the testimony of any particular witness. (R. C. 1845, p. 882, sec. 28.)

Gardenhire, (attorney general,) for the State. 1. Objection to the jurisdiction of the court cannot be taken advantage of by motion. It must be pleaded, and the plea must show what court has authority to try the cause. It is a dilatory plea and must be sworn to. (1 Chitt. Cr. Law, 438. R. C. 1845, p. 872, sec. 6. 4 Black. 270.) 2. All other circumstances being equal, affirmative must prevail over negative testimony. (Phill. on Ev. Cow. & Hill's notes, part 1, p. 421.)

RYLAND, Judge, delivered the opinion of the court.

The questions for our consideration arise upon the rulings of the court below, 1, in refusing to sustain the defendant's motion to strike the cause from the docket, and remand the same to the Benton Circuit Court; 2, in permitting the circuit attorney to read in evidence the transcript of the record from the Benton Circuit Court; 3, in giving the second instruction for the State, which instruction will be inserted in this opinion hereafter.

The first question involves the authority of the Benton Circuit Court to change the venue in this case.

1. The defendant was indicted in the Morgan Circuit Court. The venue on his application was changed to the Benton Circuit Court. After this change took place, the judge, who was afterwards elected to hold the Benton Circuit Court, having been the circuit attorney who prosecuted the defendant, Gates, on this charge, in the Morgan Circuit Court, ordered the case to be sent, by change of venue, to Camden Circuit Court, in a different judicial circuit. This order was made by the judge, of his own motion, he assigning therefor the reason, that he had been the counsel for the State in prosecuting this very defendant in Morgan Circuit Court.

“No judge of the Circuit Court shall sit on the trial of any cause or proceeding in which he is interested, or related to either party, or shall have been of counsel; but it shall be the duty of the judge to try said cause or proceeding by the consent or request of both parties.” (R. C. 1845, act concerning courts, sec. 40, p. 335.)

A change of venue in criminal cases may be allowed; but the last clause of the 28th section of article 5 of the statute concerning practice and proceedings in criminal cases, has the following prohibition: “And in no case shall a second removal of any cause be allowed.”

These clauses in our statutes conflict, and it is upon this conflict that the defendant below relied for the support of his motion. The Circuit Court, in our opinion, decided properly in overruling this motion. It was the safest and best course for that court to pursue. It would have been directly contrary to his duty, as a judge, to have set in the trial of this case: he had been counsel against the defendant, and its being a criminal prosecution makes no difference. The law will not place its judicial officers in a situation where malice or prejudice, or ill-will may have the means of making false imputations against them. A judge cannot sit in his own case—cannot sit on the trial of his own slave for crime, although the statute law may be silent as to the change of venue in such cases. (See the case of *Jim*, (a slave,) v. *The State*, 3 Mo. Rep. 147.) Public justice and the common sense of mankind cry aloud against the proposition of permitting the counsel who has prosecuted the prisoner, to change his character, put on the ermine of justice and then sit in judgment upon him. “It is both the policy and intention of our legislature to have tribunals for the determination of criminal cases above all suspicion—courts upon whose disinterestedness not only the prisoner but the whole community can repose with entire confidence.” There is no error, then, in refusing to strike the case from the docket and send it back to Benton Circuit Court.

2. There is nothing in the second question respecting the

admission of the transcripts of the records from Benton Circuit Court and from Morgan Circuit Court to be read in evidence. If these transcripts had been entirely irrelevant, or if there had been any other fatal objection to them, yet the court below did right to admit them, and to disregard any such general objection as was made in this case. It is not permitted to a party to say to such evidence, when offered, "I object to it." He must make his objections specific: he must point out the matters distinctly, and call the attention of the court directly to his objections; otherwise the courts will not pay any attention or regard to such general and wholesale objections.

3. Upon the third question, that is, the second instruction given to the jury by the Circuit Court for the state, we think the court below erred. This instruction is as follows, viz: "If witnesses of equal credibility swear—the one affirmatively and the other negatively—that is, if one swears affirmatively that he did see or hear a thing, and the other swears negatively that he did not see or hear it, the affirmative testimony must prevail." This instruction is not correct; it is not authorized by the facts in proof. The witness, Chism, speaks of his meeting the defendant, Gates, at a mud hole in the road; that they passed each other so nearly that their knees touched; that their horses wheeled round facing each other, and that much angry and threatening talk was had by defendant to witness—threatening to kill him, if he (witness) went to court and testified against defendant; that defendant put his hand in his saddle-bags, and took out what the witness supposed to be a pistol, and that defendant frequently put his hand behind him, so as to make it seem he had a pistol or some weapon. Witness said that defendant repeated his threats several times; witness also said that, after they separated, defendant spoke back to him in a loud and threatening manner; witness stated that there was a boy, his step-son, about two or three hundred yards from them at the time he and Gates were together, and he supposed the boy heard what Gates said after he started off. This boy, Talton Embry, the step-son of the witness, Chism, speaks of

the time he saw Chism and Gates meet at the mud hole ; it was the same time that Chism mentions. This witness says that they met and passed each other without making any stop : he never saw Gates have any pistol or weapon ; that Gates was coming towards witness and Chism going from him ; that if Gates had drawn any weapon, he must have seen it ; witness does not recollect of seeing Chism and Gates pass each other, at the place stated, but the one time ; witness, Embry, says he was near the corner of Howard Chism's pasture ; he saw Chism and Gates pass each other near the corner of said pasture, about sixty yards east of it, in the road : the place where they met was near a mud hole ; he knew these men were unfriendly to each other ; they passed each other without stopping ; he heard no conversation between them ; saw no effort or attempt on the part of Gates to draw a weapon, or make any attack on Chism. These witnesses directly contradict each other. The witness, Chism, says Gates and himself met ; their horses wheeled round facing each other ; they stopped, and Gates made threats, and repeated them several times ; drew a pistol or something like it, &c. Embry says he saw these men when they were some distance apart ; they met about sixty yards from the corner of the pasture, east of it, near a mud hole ; that he was near the corner of the pasture : he saw them meet and pass right on by each other, without stopping, &c. Here is no swearing affirmatively and negatively, but each witness swears to facts affirmatively. One swears that he and Gates stopped ; their horses wheeled round and faced each other ; the other swears that they did not stop, but passed on by each other without stopping. The testimony of Embry is equally affirmative in its character, as the testimony of Chism. These witnesses cannot both be truthful ; one must be wrong, and it is the peculiar province of the jury to believe the one and not the other. But the instruction virtually told the jury to believe Chism and disregard Embry. This is incorrect. The court should have informed the jury that it was their province to give credence to the one or the other, as they supposed most

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in accordance with the real facts of the case. If one witness swears he was in the city of Jefferson on the 8th day of January, 1854, and divers others swear that they were there too on the same day, but did not see the first witness; here, the fact of the first witness being in Jefferson city on the 8th January, 1854, being positively and affirmatively sworn to, is not overthrown by the testimony of the others, who swear that they did not see the first witness there on that day. These witnesses may have all testified truly, and their statements are not irreconcilable; but if a single witness had sworn that the first witness was at the city of St. Louis on that day; that he saw him there in the morning, at noon, and also in the evening, then the testimony of each is affirmative, and one or the other is not to be believed; but which one, it is for the jury to determine. The court below erred in giving this instruction; its judgment is reversed, and the cause remanded; Judge Scott concurring.

THE STATE, Appellant, *vs.* DAVIDSON, Respondent.

1. A recognizance taken by a justice, conditioned that a party charged with crime shall appear before the proper court at its next term, is not void for omitting to add "to answer the charge" or "to answer an indictment."
2. A recognizance cannot be *quashed*. Its validity can only be contested upon a *scire facias* after forfeiture.

Appeal from Dent Circuit Court.

Gardenhire, (attorney general,) for the State.
No appearance for respondent.

RYLAND, Judge, delivered the opinion of the court.

From the record in this case, it appears that David Dotson was arrested and brought before a justice of the peace in Dent county, for an attempt to commit a rape upon the person of Elizabeth Wilhelms; that the justice ordered said Dotson, after

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having inquired into the charge, to give bail for his appearance at the next term of the Circuit Court ; that Dotson, with his sureties, entered into a recognizance to appear before the Circuit Court, on the first day of the next term thereof. The recognizance is set out in the record, and is subscribed by said Dotson, as principal, and Davidson, Speck and others as his sureties.

On the first day of the next succeeding term of the Circuit Court, to which day the party was recognized to appear, his sureties appeared and represented to the court that said David Dotson had failed and neglected to appear in pursuance of his recognizance, and had absented himself. They thereupon filed their motion to quash the said recognizance, alleging as reasons in support of their motion, 1, that it is not taken pursuant to the statute, in requiring defendant to appear and answer the charge ; 2, it was not certified as required by statute ; it was taken in a cause wherein one Elizabeth Wilhelms was the supposed injured party, when, in fact, no such person ever presented or filed a complaint against said defendant ; 3, all the proceedings are illegal, irregular and void.

The court below sustained the motion to quash the recognizance, and the same was accordingly quashed, and the recognizers discharged.

To this action of the court, the circuit attorney objected and excepted, filed his bill of exceptions, and brings the case here.

1. After said Dotson and his sureties acknowledge themselves to owe and stand indebted to the state of Missouri, in the sum of three hundred dollars, to be paid, &c., the condition to the obligation is annexed, as follows : " The condition of this obligation is such that, whereas, David Dotson, of the county of Dent, and state of Missouri, having been charged with an attempt to commit a rape upon the person of one Elizabeth Wilhelms, of Dent county, Mo., and upon said charge, said Dotson was arrested and brought before Jotham Clark, an acting justice of the peace of Dent county, and state of Missouri, on the first day of August, A. D. 1854 ; the justice, after hearing

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the testimony of the several witnesses, and taking into consideration the cause, it was thought right by said justice that he (Dotson) give bond for his appearance at the Circuit Court, in amount, three hundred dollars : Now, if the said Dotson shall be and appear in his proper person, before the honorable judge of the Dent Circuit Court, at the court house, in the town of Salem, in said county of Dent, on the first Monday in September, A. D. 1854, and not depart without leave of said court, then this obligation to be void ; otherwise to remain in full force," &c. ; it was signed by the said Dotson and his sureties, and a scroll, by way of seal, opposite each name.

This court cannot see why the Circuit Court considered this recognizance or obligation void. It is true it omits to say to "answer the charge aforesaid," or to answer to an indictment to be then and there preferred against him ; but such omission does not render the recognizance void ; it is sufficient and should not have been quashed, even if that was the proper mode to test its validity.

2. But we do by no means admit that such mode was the proper way to test the validity of the recognizance. The Circuit Court should not have permitted the sureties for Dotson in his absence to have made any such motion ; it was the duty of the court to have had Dotson called, and to have called his recognizors, and upon the neglect or failure of Dotson to appear and surrender himself in court, or upon the failure of his bail to produce him in court, then the court should have had the recognizance declared forfeited, and a *scire facias* to issue thereon against the recognizors.

This practice of hearing motions to quash the recognizance, in the absence of the principal obligor, must lead at once to the subversion of all proper administration of the criminal law. The Circuit Court might take the forfeiture of the recognizance, and upon the bail producing the accused at the next term, that court might direct all further proceedings to be stopped against the bail, upon the forfeiture, as it is not money, but the punishment of the guilty that the law mainly requires in such cases.

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If, upon the *scire facias*, the question about the validity of the recognizance should occur, then the court must decide that question; but not upon a motion made by the bail in the absence of their principal. The recognizers would have but to hide their principal out for a short time, go to court and move to quash the recognizance for some slight and informal defect, get the recognizance quashed, and thereby put an end, so far as the state is concerned, to the whole matter.

This course is not to be permitted. The recognizers have power over their principal; they can take him any where, and they can deliver him up to the jailor of the county; he is supposed to be in their hands instead of being "within the four walls of the prison." Let them, then, know that they must produce him in court, or show cause, upon the *scire facias*, why the state should not have judgment against them on their recognizance.

The judgment of the court below, in this case, is reversed, and the case is remanded, that the order quashing the recognizance may be set aside; the other judges concurring.

THE STATE, Appellant, vs. MYERS, Respondent.

1. An indictment under the thirtieth section of the act concerning "school lands," (R. C. 1845,) which charges the defendant with committing "waste, trespass and other injury," &c., "by cutting down and carrying away timber," &c., is not bad for duplicity.

Appeal from Sullivan Circuit Court.

Gardenhire, (attorney general,) for the State.

No appearance for respondent.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Valentine S. Myers, was indicted at the April term, 1854, of the Circuit Court of Sullivan county, for trespassing upon school land. At the October term following, the

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defendant appeared and filed his motion to quash the indictment. This motion was sustained, and the court quashed the indictment. The circuit attorney excepted to the ruling of the court, filed his bill of exceptions, and brings the case here by writ of error. The indictment, then, raises the only point for our consideration.

1. The indictment charges that "Valentine S. Myers, on, &c., at, &c., with force and arms, unlawfully did commit waste and trespass and other injury upon certain school lands, situated in the county of Sullivan, in the state of Missouri, and then and there known and designated as section sixteen, in township sixty-one, of range twenty-one, by then and there unlawfully cutting down divers, to-wit, fifty timber trees, and fifty other trees, then and there standing and growing upon said lands, and did then and there unlawfully carry away the timber and wood of said trees, contrary," &c.

The defendant's reasons, in support of his motion to quash, are, because "the indictment is double in charging different offences under the same in one count. It is uncertain and insufficient, and does not properly charge any offence under the statute in such cases."

The section of the act upon which this indictment was found, is as follows: Sec. 30. "If any person shall commit waste, trespass or other injury upon any school lands in the state, or upon any improvements thereon, the person so offending shall, upon conviction thereof, be fined in a sum not exceeding five hundred dollars." (R. C. 1845, tit. "School Lands.")

The indictment charges that defendant did commit waste and trespass and other injury upon the sixteenth section, by cutting down fifty timber trees and fifty other trees, and did then and there unlawfully carry away the timber and wood of said trees.

There is no force in the objections taken by the defendant to this indictment. It is clearly and manifestly sufficient, and the court should not have sustained the motion. It is to be regretted that the circuit courts should lend so willing an ear to

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such trivial objections to indictments for mere misdemeanors. In the case of *The State v. Fletcher*, (18 Mo. Rep. 427,) this court said: "The practice of sustaining motions to quash indictments for every trivial objection, or for every formal defect, tends to the great perversion of justice and to the increase of offence. The motions to quash are always addressed to the discretion of the court." In the same opinion, is a quotation from Chitty on Crim. Law, in which it is laid down that, "in case of misdemeanors, the joinder of several offences will not, in general, vitiate in any stage of the prosecution." It is the constant practice to receive evidence of several libels and assaults upon the same indictment. See, more especially, the case of *State v. Storrs*, (3 Mo. Rep. p. 9.)

Here, the cutting and carrying away the timber may be one continued trespass, and it is to the advantage of the defendant that the circuit attorney should thus have considered it one act and one offence.

The judgment of the Circuit Court must be reversed, and the cause remanded; Judge Scott concurring.

THE STATE, Appellant, vs. McCracken, Respondent.

1. "The county aforesaid" in an indictment not a sufficient venue, where two counties have been previously named.

Appeal from Polk Circuit Court.

Indictment of a road overseer for neglect of duty. The indictment was quashed below and the State appealed. Enough of the indictment is contained in the opinion of the court to show the point decided.

Gardenhire, (attorney general,) for the state, cited 1 Chitty's Crim. Law, 170. R. C. 1845, p. 869, sec. 17.

F. P. Wright, for respondent, cited 2 Mo. Rep. 228. 3 Mo. Rep. 45. 1 Chitty's Crim. Law, 179.

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RYLAND, Judge, delivered the opinion of the court.

The court did not err in quashing this indictment. The venue is no where laid with certainty, as to the county and road district over which the defendant was overseer. The indictment charges "that there is a public road and highway leading from Hickory county line, on the state road leading from Warsaw to Bolivar, and terminating at Dry Pome de Terre, in the county of Polk aforesaid; and that Ephraim McCracken, of said county, on the day and year aforesaid, was, and ever since hath been, and yet is overseer of said road district number one, in the county aforesaid, duly appointed," &c.; and whenever afterwards the venue is any where laid in said indictment, it is said to be at the county aforesaid.

1. Although this court discourages trivial technical objections and exceptions to indictments for misdemeanors, and has generally discountenanced such; yet when no time is laid to any act material to constitute the offence, and no venue properly and certainly laid, and such exceptions are taken in the court below, and by that court sustained, it will be useless to come here to have the judgment of such lower court reconsidered.

The case of *The State v. Hardwick*, (2 Mo. Rep. 228,) is direct authority in support of the judgment of the Circuit Court in this case.

Here, the county of Hickory is named, and also the county of Polk—two counties mentioned in the body of the indictment, and the offence is stated to have been committed "at the county aforesaid," without showing certainly which county; this, according to the case of *The State v. Hardwick*, is not sufficient. The same rule in regard to indictments is again laid down by this court, in the case of *Jane v. The State*, (3 Mo. Rep. 63.) When two different times and two different places are mentioned in an indictment, and a material fact is afterwards averred, it will not be sufficient to give venue to such fact, by stating "then and there," only; for it will not do to say that, grammatically, "then and there refer" to the last

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ante cedent time and place. Upon looking into this indictment, we are satisfied the Circuit Court committed no error in quashing the same. The judgment is therefore affirmed; Judge Scott concurring.

THE STATE, Respondent, vs. BARNES, Appellant.

1. A grand jury may be summoned and an indictment found at an adjourned term by statute.

Appeal from Polk Circuit Court.

W. H. Otter, for appellant.

Gardenhire, (attorney general,) for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted by the grand jury at an adjourned term of the Circuit Court, held in January, A. D. 1853, within and for the county of Dade. From the record before us, it appears that the Circuit Court within and for the county of Dade, adjourned over its regular term for October, 1852, until Monday, the 10th day of January, A. D. 1853; that on Monday, 10th January, 1853, the adjourned term began, and was held in pursuance of the order theretofore made at the regular term of the court in October, 1852.

At this adjourned term, an order was made by the court directing and requiring the sheriff to summon a grand jury. The order is as follows: "Now at this day, it appearing to the satisfaction of the court that certain offences have been committed since the grand jury at this term were discharged, and which is now here brought to the discovery of the court; it is therefore ordered and directed by the court, that the sheriff of Dade county summon a grand jury to appear in this court forthwith." This the court had authority and power to do by virtue of the thirteenth section of the third article of the act concerning "practice and proceedings in criminal cases."

(R. C. 1845, p. 865.) "If any offence be committed or discovered during the sitting of any Circuit Court, after the grand jury attending such court shall be discharged, such Court may, in its discretion, by an order to be entered on its minutes, direct the sheriff to summon another grand jury."

I am thus particular in noticing this proceeding, because the defendant, Barnes, who was indicted at this adjourned term and by this grand jury thus ordered to be summoned, rests his whole grounds for the reversal of this judgment upon these proceedings.

The indictment was for a felonious assaulting and shooting at one Thomas Kimman. The defendant obtained a change of venue from Dade Circuit Court to the Circuit Court of Polk county; was there tried and found guilty, and sentenced to pay one hundred dollars fine, and be imprisoned in the county jail for three months. He moved in arrest of judgment, and assigned the following causes therefor: because the record does not show that Dade Circuit Court, at the term the indictment was found, had jurisdiction; because there is no record showing when said court had adjourned to or to what time.

1. There is nothing in these causes to support the motion in arrest. It does appear that the Circuit Court of Dade county did adjourn its regular October term in the year 1852, over to the 10th day of January, A. D. 1853; it then commenced its sessions again, and it was the regular October term adjourned. At this adjourned term, which is the same as though it were a regular daily adjournment of the same term from October to January, had nothing intervened to prevent it, the second grand jury was impannelled. This grand jury was to inquire into offences discovered since the last grand jury had been discharged. This grand jury indicted Henry Barnes, the defendant, and there cannot be a doubt of the jurisdiction of the court in which the indictment was found. The record plainly shows when the regular October term was adjourned to, namely, the 10th January, 1853, and it also as plainly shows that on that day the court met pursuant to adjournment.

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These being the only matters relied on for arresting the judgment, the court below very properly overruled the motion.

We have examined these causes assigned in the motion for an arrest of the judgment, and also have examined the indictment. In the opinion of this court, the indictment is sufficient. There being no exceptions taken to any other act of the court below, and there being no reason why its judgment should be arrested, this court affirms the judgment of the Polk Circuit Court, and orders the same to be carried into execution; Judge Scott concurring.

THE STATE, Plaintiff in Error, *vs.* SHIFLETT, Defendant in Error.

1. An indictment upon one section of a statute need not negative an exception in a subsequent section.

Error to Linn Circuit Court.

Gardenhire, (attorney general,) for the State. 1. When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos. (1 Chitty's Crim. Law, 283. 2 Hale, 171. Hawk. C. 2, c. 25, s. 112. *State v. Adams*, 6 N. Hamp. 533-4.) 2. The indictment is not double. (*Storrs v. State*, 3 Mo. Rep. 7.) 3. The venue is sufficiently laid. (1 Chitty's Crim. Law, 198. *State v. Edwards*, 19 Mo. Rep. 677.)

No appearance for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The defendant, James Dudley Shiflett, was indicted at the April term of the Circuit Court for the county of Linn, in the year eighteen hundred and fifty-three, for wilfully and unlawfully opening one sealed letter not addressed to himself, and

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without authority from the writer thereof, or from the person to whom it was addressed.

The defendant appeared to the indictment at the October term of the court, and made his motion to quash the same, for the following reasons: "That said indictment does not negative the fact that said offence is punishable by the laws of the United States; that said indictment is defective in joining two separate offences in the same count; that said indictment does not give venue to the person by whom said letter was written, &c.; no venue to the reading of the letter; no sufficient venue to the material charges contained in the same; and that the indictment is double, informal, insufficient and uncertain."

The Circuit Court quashed the indictment. The circuit attorney excepted to the ruling of the court, filed his bill of exceptions, and brings the case here by writ of error.

1. The indictment is based upon the 40th section of the 8th article of the statute concerning "Crimes and Punishments," (R. C. 1845, p. 406,) which section is as follows, viz: "If any person shall wilfully open or read, or cause to be read, any sealed letter not addressed to himself, without authority to do so from the writer thereof, or from the person to whom it is addressed, he shall, on conviction, be adjudged guilty of a misdemeanor, and shall be punished by fine not exceeding two hundred and fifty dollars, or by imprisonment in a county jail not exceeding three months."

Sec. 41. "Every person who shall publish the whole or any part of the contents of such letter, without the authority of the writer thereof, or of the person to whom it is addressed, knowing the same to have been unlawfully opened, shall, on conviction, be adjudged guilty of a misdemeanor, and punished as in the preceding section is specified."

Sec. 42. "The two last sections shall not extend to the breaking open of letters, which shall be punishable by the laws of the United States."

The indictment charges that James Dudley Shiflett, late of

Linn county, "on, &c., with force and arms, at the county aforesaid, one sealed letter, then and there being, and then and there addressed to one Catharine Buchanan, and purporting to have been written by one George Gimmett, did then and there wilfully and unlawfully open and read said letter, without any authority from the said Catharine Buchanan, or from the said George Gimmett, then and there authorizing him, the said James Dudley Shiflett, to open and read said letter, contrary," &c.

This indictment is substantially good; the venue is properly laid to all the material charges therein, and there is not the least pretext for considering it double. The charge is but one offence, and it is stated sufficiently plain. I presume the court below quashed it for the reason first assigned by defendant in support of his motion, "that the said indictment does not negative the fact that said offence is punishable by the laws of the United States."

There is no force in this objection. It is a well settled rule that, when a statute contains provisoes and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisoes it contains.

In the case of *The State v. Adams*, (6 N. Hamp. Rep. 533,) the court laid down this rule thus: "The rule is, where the exception is in the enacting clause of the statute, it must be negatived in the indictment. But where it is in a subsequent clause of the statute, it is mere matter of defence." It is laid down in Bacon's Abridgment, tit. "Indictment," letter H, 3, that "There is no need to allege in an indictment on a statute, that the defendant is not within any of its provisoes, notwithstanding the purview expressly takes notice of them, as by saying that none shall do the thing prohibited otherwise than in such special cases, &c., as are expressed in the act." Lord Mansfield, in the case of the *King v. Morice Jarvis*, (Hilary term, 30 Geo. II, reported in 1 East. Rep. 646, in notes,) said: "For it is a known distinction that, what comes by way of proviso in a statute, must be insisted on by way of defence

by the party accused; but where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them." Same rule laid down in Chitty's Crim. Law, vol. 1, p. 283, (a.)

In *Commonwealth v. Maxwell*, (2 Pick. 140,) Putnam, Judge, said: "The rule is, that where the enacting clause describes the offence, with certain exceptions, it is necessary to state all the circumstances which constitute the offence, and to negative the exceptions; but where the exceptions are contained in separate clauses or provisions of the statute, they may be omitted in the indictment, and may be shown by the defendant as matters in defence."

In *Vavasour v. Ormrod*, (6 Barn. & Cress. 430, reported in 13 Eng. Com. Law R. 225,) Lord Tenterden, Chief Justice, said: "If an act of parliament, or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it with the exception; and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance."

In the case of the *United States v. Hayward*, (2 Gallison's Rep. 497,) Justice Story, in delivering the opinion, said: "The general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions which come in by way of proviso or in subsequent statutes, are properly matter of defence for the defendant." (See the *King v. Bryan*, 2 Strange, 1101. *Teel v. Fonda*, 4 Johns. Rep. 306.) This doctrine is well settled. Lord Mansfield, nearly a hundred years ago, spoke of it as a long established and well known rule.

Now let us apply it to the case before us. The fortieth sec-

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tion above cited, of the act concerning crimes and punishments, article 8, is the clause or section creating this offence. This section is the enacting clause, where the offence has its legal origin ; it is there first pointed out and created by the statute. The 42d section has the exception to the offence ; it is in a subsequent and different clause from the one enacting or creating the offence ; and, under the well known and long established rule, in such cases, the indictment need not negative the matters creating the proviso or the exception.

The indictment then, in this case, is considered sufficient, and it was error in the Circuit Court to quash it. (See *State v. Edwards*, 19 Mo. Rep. 675.)

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings ; Judge Scott concurring.

THE STATE, Appellant, vs. BESS, Respondent.

1. An indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the third specification of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) is good, although it does not state whether they were married or unmarried.

Appeal from Shannon Circuit Court.

Gardenhire, (attorney general,) for the State.

No appearance for respondent.

RYLAND, Judge, delivered the opinion of the court.

At the April term of the Circuit Court, within and for the county of Shannon, in the year 1854, the grand jury indicted John Bess and Polly Bess, (alias Polly Cox,) for open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other.

At the September term following, the defendants appeared and made their motion to quash the indictment. The court sustained their motion and quashed the indictment. The circuit attorney excepted to the judgment of the court, and brings the case here by appeal. The sufficiency of the indictment is the only matter for the consideration of this court. This indictment is as follows :

“State of Missouri, county of Shannon. In the Shannon Circuit Court—April term, 1854. The grand jurors for the state of Missouri, impaneled, &c., upon their oath present, that John Bess and Polly Bess, (alias Polly Cox,) both late of Shannon county, on the first day of May, in the year eighteen hundred and fifty-three, and on divers other days between that day and the time of the finding of this bill of indictment, with force and arms, at, &c., did then and there live in a state of open and notorious adultery, and did then and there lewdly and lasciviously abide and cohabit with each other ; and *was* then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other, contrary,” &c.

This indictment is for an alleged offence against the eighth section of the eighth article of the act concerning crimes and punishments, (R. C. 1845, p. 400,) which is as follows : “Every person who shall live in a state of open and notorious adultery ; and every man and woman, (one or both of whom are married, and not to each other,) who shall lewdly and lasciviously abide and cohabit with each other ; and every person married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty,” &c.

The indictment charges that the defendants “did live in a state of open and notorious adultery,” and “did then and there lewdly and lasciviously abide and cohabit with each other.” We do not consider the indictment good in respect to either one of these charges and specifications ; it is not sufficient to

charge that two persons did live in a state of open and notorious adultery; it must be shown that one or both are married; adultery is a violation of the marriage bed. Marriage is also necessary in order to be within the second charge or specification in the above section of the statute: "Every man and woman, (one or both of whom are married, and not to each other,) who shall lewdly and lasciviously abide and cohabit with each other." It must also be averred that one or both of the two persons are married, and not to each other, in order to be guilty, under the second specification, as pointed out in the above section of the act. But there is a third clause of this section, in which it is provided against those persons, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior. Had the indictment, in this case, included only the two offences, as charged above, that is, "the open and notorious adultery," and the "lewdly and lasciviously abiding and cohabiting with each other," in the manner as is therein set forth, it would have been bad; for neither one of these offences is properly charged. The indictment, however, contains a third charge, and it is stated correctly under the statute. After setting forth the two charges, as noticed above, it proceeds thus: "And were then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other." Here we find an offence sufficiently charged in the indictment, and sufficiently described under the statute. What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together, and cohabiting with each other?

The defendants are charged with being guilty of open, gross lewdness and lascivious behavior by publicly, lewdly and lasciviously cohabiting with each other. The offence charged is an act of open, gross lewdness and lascivious behavior. The manner in which the offence is perpetrated is by the defendants publicly, lewdly and lasciviously cohabiting together. There is nothing in the objection of the defendants to the indictment,

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which would warrant the court below in quashing the same. The judgment is therefore reversed, and the case remanded for further proceedings ; the other judges concurring.

THE STATE, Appellant, *vs.* WILHIGHT, Respondent.

1. See *State v. Bess*, ante.

Appeal from Reynolds Circuit Court.

Gardenhire, (attorney general,) for the State.

No appearance for respondent.

RYLAND, Judge. This case is within the principle settled by this court in the case of the *State v. John Bess & Polly Cox*, at this term. It is an indictment under the same section of the act concerning crimes and punishments, and for a similar offence, and charged in the same manner as the offence was against Bess and Cox. Reference is therefore had to the opinion of the court in the case of *Bess & Cox*, for the determination of this. The judgment of the court below is reversed, and the cause remanded for further proceedings ; the other judges concurring.

THE STATE, Appellant, *vs.* TULEY, Respondent.*

1. An indictment under the 57th section of article one of the act concerning "roads and highways," (R. C. 1845,) must distinctly charge that the fork of the road at which the defendant failed to place a finger board, is within the road district of which he was overseer ; and to constitute an offence under this section, the roads forming the fork must not terminate at the same point.

Appeal from Clay Circuit Court.

Gardenhire, (attorney general,) for the State.

No appearance for the respondent.

*Three other precisely similar cases were decided at the same time with this case, viz : *The State v. Singleton*, *The State v. Bond*, and *The State v. Stephenson*, the judgments in all being affirmed.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Tuley, was indicted by the grand jury at the April term of the Circuit Court within and for the county of Clay, in the year 1854, for neglect of duty as a road overseer. The defendant demurred to the indictment. The court sustained the demurrer, and the State brings the case here by appeal.

The sufficiency of the indictment is the only matter for the consideration of this court. The indictment is as follows :

“ State of Missouri, Fifth Judicial Circuit, Clay county, to-wit—In the Circuit Court of Clay County, in the state of Missouri, of April term, A. D. 1854. The grand jurors for the state of Missouri, for the body of the county of Clay aforesaid, upon their oath present, that Victor M. Tuley, late of said county of Clay, on, &c., in the year of our Lord, one thousand eight hundred and fifty-four, at the county of Clay aforesaid, was, and ever since that time has been, and still is the road overseer of that part of a certain public road in the county of Clay aforesaid, known as road district number thirty-three, to-wit : commencing at the forks of the road, where the one goes to Turnham’s landing and the other to Meek’s ferry, thence to Richfield, and that the said Victor M. Tuley, road overseer as aforesaid, on, &c., at, &c., unlawfully and wilfully failed and neglected, and he still does wilfully fail and neglect to erect and keep a post at the fork of the road, in the road district aforesaid, where a certain public road leading to Richfield, in said county of Clay, leaves the said road, to-wit : the road district aforesaid, and to affix a finger board thereto, containing a legible inscription, directing the way and noting the distance to the next remarkable place on the road ; or to affix to a suitable tree, at the proper place, to-wit : at the forks of the road aforesaid, a finger board, containing a legible inscription, directing the way and noting the distance to the next remarkable place on the road, against the form,” &c.

1. This indictment is for an alleged violation of the 57th sec-

tion, first article of the statute concerning roads and highways, (R. C. 1845,) which is as follows: Sec. 57. "Every overseer shall erect and keep a post at every fork of the road or cross road in his road district, unless a suitable tree be found at the proper place, to which shall be affixed a finger board containing a legible inscription, directing the way and noting the distance to the next remarkable place on the road."

The indictment is insufficient; it does not directly charge that there is a fork in the road over which the defendant is overseer. This is left entirely to implication. The indictment avers that Tuley is road overseer of that part of a certain public road known as road district number thirty-three, to-wit: commencing at the forks of the road where one goes to Turnham's landing, and the other to Meek's ferry, thence to Richfield; it then avers that Tuley wilfully failed and neglected to erect and keep a post at the fork of the road, in the road district aforesaid, where a certain public road leading to Richfield leaves the said road, to-wit: the road district aforesaid.

From the indictment, we are led to suppose that the road district number thirty-three, over which the defendant is road overseer, begins at the fork, where one road leads to Turnham's landing and the other goes to Meek's ferry, thence on to Richfield; and that the said district number thirty-three consists of that road which goes to Richfield by Meek's ferry; if this be correct, then the objection taken, as one cause of the defendant's demurrer, is a good one, viz: "That the road charged with leaving the road, so as to make the fork, in fact was the same road starting from and going to the same place."

In indictments, the principal facts in which the offence consists, must be positively or directly charged—must not be left to be implied by the court.

The indictment in this case is not drawn so as to charge the offence directly; it is too uncertain; it requires implication, (which is not permitted,) before we can say that there has been an offence. Judge Scott concurring, the judgment below is affirmed.

State v. Larrimore.

THE STATE, Defendant in Error, vs. LARRIMORE, Plaintiff
in Error.

1. Same case, 19 Mo. Rep. 391, affirmed.
2. A new trial will not be granted on account of newly discovered evidence which is merely cumulative.

Error to Polk Circuit Court.

Indictment for selling liquor without license. At the trial, the only witness introduced was a boy, examined on behalf of the state. He testified that Williams one day came into the shop of the defendant, who was a practising physician, and stated that he was sick and wanted some brandy. Defendant at first refused to let him have it, but finally gave him a drink for which Williams paid him twenty cents. Williams did not look pale. Defendant did not feel his pulse nor look at his tongue. Upon cross-examination, witness stated that Williams acted as if he was sick. The court instructed the jury to acquit, if they believed the defendant sold the brandy in good faith, as a practising physician, *upon his professional judgment of its necessity*. The defendant was convicted. He afterwards filed a motion for a new trial, accompanied by his affidavit that since the former trial he had discovered the new and material evidence of John O. Devin, by which he believed he could establish that he sold the brandy to Williams in good faith, as a medicine, upon his professional judgment; that he did not know that the facts were within the knowledge of Devin until after the former trial; that Devin would prove that Williams, after he drank the brandy, was in defendant's shop and looked pale, and appeared to have a slight chill, but said it was not so severe as usual on account of his having drank the brandy; and that defendant had a good and meritorious defence. The affidavit of Devin, corroborating this statement, was also filed. The new trial was not granted, and the defendant sued out this writ of error.

F. P. Wright, for plaintiff in error. A new trial should

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have been granted on account of the newly discovered evidence. (2 Smedes & Marsh. 313. 7 Howard's (Miss.) Rep. 365. 7 Metcalf, 478. 5 Cow. 208. 14 J. R. 186. 61 E. C. L. R. 160. 6 Pick. 114. 4 Wend. 579.) The defendant had offered no evidence whatever on the trial.

Gardenhire, (attorney general,) for the state. The new evidence was merely cumulative, and so no ground for a new trial. (12 Mo. Rep. 57.) It related to a point upon which the only witness in the cause was rigidly examined.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for unlawfully selling intoxicating liquor in a less quantity than one quart, to-wit: one pint of brandy, to Albert Williams, without having any license of any kind for that purpose. The indictment was found at the April term, 1852, of the Polk Circuit Court.

The defendant was found guilty and fined twenty dollars. He brought the case to this court; the judgment of the Circuit Court was reversed, and the case remanded. Upon a second trial, the defendant was again found guilty and fined twenty dollars; he moved for a new trial, which being denied him, he again brings the case to this court.

The defence below consisted, mainly, in an effort to show that the defendant sold the brandy to said Williams as a medicine, in the ordinary practice of his profession as a physician; and whether he did so sell the brandy to said Williams as a medicine or not, was the question before the jury. The defendant was a practising physician.

1. When the case was before this court heretofore, we thought that the question, as to what manner or under what circumstances the brandy was sold to Williams by the defendant, had not been properly left to the jury; and in the opinion then delivered, this court stated that the proper question for the jury to decide was: "Whether defendant really administered the liquor to a diseased person, as a medicine, upon his professional judgment of its necessity?"

In the same opinion, it was stated: "If a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished. But physicians are not to become dram-shop keepers under color of their professional practice."

In looking over the instructions given to the jury on the last trial, we find them to embody the principles declared by this court in its opinion on this case when it was first before us.

The instructions were, in the main, as favorable to the defendant as the law would justify. His case was properly submitted, and the jury were properly instructed, and their attention called to the fact whether this brandy was really administered as a medicine or not. They found the defendant guilty, and we are not disposed to question the propriety of such finding.

2. But the defendant now relies upon newly discovered evidence. We have examined his affidavit, and also the affidavit of his new witness, and come to the conclusion that they do not make out grounds sufficient for a new trial. The evidence is only what is termed cumulative, and is such as never warrants the action of the appellate courts in setting aside verdicts and ordering new trials, unless under some peculiar circumstances. Here, after two trials, after the case has been in court for two years, the defendant seeks for a new trial on account of newly discovered evidence, and that evidence in relation to the situation of the person who purchased the brandy, in regard to his sickness or health, so as to show whether the brandy was administered as a medicine professionally by the defendant or not—the very question on which the case turned and on which all the evidence of the witness introduced had a direct bearing, and this new evidence being but very slightly in opposition to that already given; indeed, it is hard to perceive any inconsistency between that given and that newly discovered.

But what is decisive of this application is, the total failure to account for the non-production of Williams, the supposed

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patient. What has become of him? Where is he? Did he die or recover? Surely Dr. Larrimore knew whether Williams could be risked or relied upon to state whether the brandy was in good faith administered as a medicine or bought as a beverage; yet he fails to state any thing about Williams. It is useless to spend any further consideration on such a case. The judgment below is affirmed; Judge Scott concurring.

[END OF JANUARY TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

MARCH TERM, 1855, AT ST. LOUIS.

MAGUIRE, Appellant, *vs.* VICE, Respondent.

1. A confirmation by the act of congress of March 3, 1807, and a patent is a better legal title than a confirmation by the same act without a patent.
2. A party, who, under the present practice, seeks equitable relief against a legal title, must set forth such a state of facts as would have entitled him to the relief under the old practice.

Appeal from St. Louis Court of Common Pleas.

This was an action commenced in January, 1852, for the possession of a lot in the northern part of the city of St. Louis, claimed by the plaintiff to be within what is known as the Brazeau reservation, when truly located.

The following is deemed a sufficient statement of the facts: On the 10th of June, 1794, the Spanish lieutenant governor conceded to Joseph Brazeau four by twenty arpens of land. On the 9th of May, 1798, Brazeau sold the land conceded, to Louis

Labeaume, reserving for himself four by four arpens in the southern end of the tract. Plaintiff is the legal representative of Brazeau as to this reservation. In 1799, Labeaume obtained from the governor an extension of his tract acquired from Brazeau, and a survey of the whole was executed by Soulard. Plaintiff claims that this survey erroneously included the four by four arpens reserved by Brazeau in his deed to Labeaume. Defendant is tenant of the legal representatives of Labeaume. On the 22d of September, 1810, the board of commissioners confirmed 356 arpens to Labeaume or his legal representatives, and four arpens to Brazeau or his representatives, and ordered that the same be surveyed agreeably to the concession to Labeaume, and as respects the four arpens, agreeably to a reserve made in the deed from Brazeau to Labeaume. Surveys were not executed and approved until February 26, 1852, after the commencement of this suit. Patents for both tracts were issued on the 26th of March following. The patent to Labeaume or his legal representatives embraces the land in Soulard's survey and the land in controversy. The patent to Brazeau is for four by four arpens immediately south of the land patented to Labeaume.

A large mass of evidence was introduced in the court below bearing upon the question of the true location of the four by four arpens reserved by Brazeau in his deed to Labeaume, and this question was submitted to the jury under instructions from the court, the surveys and patents not being treated as conclusive of the true location. Questions were also made upon the Spanish law of prescription, the statute of limitations, and the law of estoppel; but as none of these questions are touched in the opinion which follows, it is thought useless to set out the facts and the evidence upon which they arose. There was a verdict for the defendant and a judgment thereupon, from which the plaintiff appealed. The cause was argued in this court at a previous term by Mr. *Haight* and Mr. *Todd*, for appellant, and by Mr. *Field* and Mr. *B. A. Hill*, for respondent. Judge Leonard was not then upon the bench.

SCOTT, Judge, delivered the opinion of the court.

This was an action in the nature of an ejectment, begun in January, 1852, by the plaintiff, Maguire, against the defendant, Vice, for a lot of ground situated in the northern part of the city of St. Louis, in which there was a judgment for the defendant.

1. The pleadings presented a case in which the mere technical legal title could be investigated. The title of the plaintiff was a confirmation under the act of congress of the 3d March, 1807, entitled "An act respecting claims to land in the Territories of Orleans and Louisiana." The defendant relied on a confirmation under the same act and a patent thereon. It is evident that, in such a case, the judgment must be for the defendant. The very same titles that were set up in this case came before the Supreme Court of the United States at its last term, in the case of *West v. Cochran*, and the judgment was for the defendant, on the ground that the patent was the better title, and that, until the emanation of a patent, the legal title did not pass from the United States by a confirmation under the act of congress aforesaid.

2. Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title, must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks, under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title, he cannot, on the trial, be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief, he must prepare his pleadings with an eye to obtain it, and this must be done whether he is seeking relief as plaintiff or defendant.

Judge Ryland concurring, the judgment will be affirmed.

McMurtry v. Glascock.—Louisiana Plank Road Co. v. Mitchell.

McMURTRY, Respondent, *vs.* GLASCOCK, Appellant.

1. In a partition suit, judgment that partition be made is an interlocutory judgment from which no appeal lies.

Appeal from Monroe Circuit Court.

Glover & Richardson, for respondent, moved to dismiss the appeal on the ground that there was no final judgment.

SCOTT, Judge. This was a proceeding in partition, and after a judgment that partition be made was entered, an appeal was taken to this court. There is now a motion to dismiss the appeal, because there is no final judgment in the cause. The motion must be sustained. In partition suits, there are two judgments; the first is that partition be made, which is interlocutory; the other, which is entered upon the coming in of the report of the commissioners appointed to make partition, is that the partition be firm and effectual forever. As the judgment entered here was merely interlocutory and not a final one, the appellant was not entitled to an appeal from it. (*Gudgell & Austin v. Meud et al.*, 8 Mo. Rep. 53.)

The other judges concurring, the appeal will be dismissed.

LOUISIANA & MIDDLETOWN PLANK ROAD Co., Plaintiff in Error,
vs. MITCHELL, Defendant in Error.

1. No appeal or writ of error lies from a voluntary non-suit taken upon the refusal of the inferior court to strike out an answer as insufficient.

Error to Pike Circuit Court.

The counsel were proceeding to argue this case upon its merits, when they were stopped by the court, it appearing that a nonsuit had been voluntarily taken below, upon the refusal of the court to strike out an answer alleged to be insufficient. Mr. *Buckner* appeared for appellant, and Mr. *Broadhead* for respondent.

Grand Lodge of Masons v. Knox.

SCOTT, Judge. This was an action to recover call on a subscription for plank road stock. The defendant filed an answer to the plaintiff's petition, and the plaintiff thereupon moved to strike out the answer of the defendant, which motion was overruled. The plaintiff then took a non-suit and sued out this writ of error.

1. Under the old practice, it was settled that a writ of error will not lie to the judgment of a court overruling a demurrer. (*Palmer v. Crane*, 8 Mo. Rep. 619.) Under the present practice act, a motion to strike out an answer for insufficiency is substituted in practice for a demurrer, and it has been held that a writ of error or appeal will not lie on a voluntary non-suit taken upon the refusal of the court to strike out an answer as insufficient. (*Schuller's Adm'r v. Bockwinkle's Adm'r*, 19 Mo. Rep. 647. *Dumey v. Schoeffler*, ante, p. 373.) The other judges concurring, the writ of error will be dismissed.

GRAND LODGE OF MASONS, Respondent, vs. KNOX, Appellant.

1. In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal and conversion of fixtures, without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds.

Appeal from Marion Circuit Court.

This was an action upon two bonds for the payment of one thousand dollars each. The defendant, in his answer, set up as a defence that the bonds were given for part of the purchase money of what was known as the Marion College tract of land, with the buildings and improvements thereon situate, bought by him of plaintiff; that the contract of sale was made on the 21st of September, 1849, and the bonds executed and delivered on the 29th of October following; that at the time of the sale, "there were within and permanently attached to, and

constituting a part of a certain brick house called "the chapel," standing on said land, five several cases or closets, made and designed for book cases; and that afterwards, and before the possession of said land and premises was delivered to the defendant, and before the delivery of said bonds to the plaintiff, the plaintiff, by her agents, without the knowledge or consent of the defendant, took out from the walls of said house, and carried away and converted to her own use the said cases or closets, and in taking the same out, injured, broke and mutilated the chimney, chimney boards, frames, casings, fire-places and plastering." The defendant claimed a deduction from the amount of the bonds sufficient to cover the damages sustained by a removal of the cases.

At the trial, the defendant offered evidence that the terms of the sale of the college property were agreed on between the defendant and an agent of the plaintiff on the 21st of September, 1849, and that they were afterwards to meet in St. Louis and execute the writings; that the defendant then returned to his residence in St. Louis county; that on the 29th of October following, he met the plaintiff's agent in St. Louis and executed the bonds sued upon in part payment for the property; that at the time of the sale on the 21st of September, there were in the chapel on the land five book-cases, which were seen by the defendant when he agreed to purchase the land, and that he did not again see the property until after the execution of the bonds sued upon; and that in the mean time the book-cases were removed under the authority of the plaintiff.

There was conflicting evidence as to whether the cases removed were fixtures or not, one witness, (whose deposition, taken by the plaintiff, was read by the defendant to prove the removal,) stating that they were fastened to the wall and otherwise attached to the building, and another witness stating differently.

After the defendant had closed his case, the Circuit Court, on motion of the plaintiff, excluded all the evidence offered by him, to which he excepted, and after a verdict for the plaintiff,

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and an unsuccessful motion for a new trial, appealed to this court. The case was orally argued by Mr. Knox, for appellant, and Mr. Broadhead, for respondent.

Knox & Kellogg, for appellant, in their brief cited *House v. Marshall*, (18 Mo. Rep. 369,) and *Taylor v. Maguire*, (12 Mo. Rep. 317,) upon the point that the Circuit Court erred in excluding the evidence offered by the defendant below.

Broadhead, for respondent. 1. The defence set up is a claim for unliquidated damages, and is not the subject of set-off. 2. The answer does not sufficiently set out the terms of the contract of sale, and therefore evidence to prove a failure of consideration is out of place.

LEONARD, Judge, delivered the opinion of the court.

The question to be decided here is, whether a purchaser of real property may set up, in diminution of the price, the value of fixtures upon the premises during the treaty and embraced in the sale, which the vendors subsequently, and before the completion of the transaction, removed and appropriated to their own use, without the consent or knowledge, and against the will of the purchaser. This claim having been set up in the answer and the evidence rejected upon the trial, the judgment must be reversed, if the rejected evidence ought to have been retained in the cause. The record does not show the ground upon which the court proceeded in striking it out; but it is argued before us, for the plaintiff, that it is a claim for unliquidated damages, and therefore not allowable as a set-off; and on the other side, that it is good by way of recoupment of damages, which is the matter we have considered, and upon which the cause has been settled here. This doctrine of recoupment, though of ancient origin, has been recently greatly extended in its application, and it may not be improper, therefore, on the present occasion, to go more at large into it than is necessary for the decision of this cause, and in doing so, to refer to the leading American cases, for the purpose of showing the application, extent and limitations of the rule.

The common law, confining every suit to the particular subject of litigation that gave rise to it, rigidly excluded all matters of set-off; but the English court of chancery, extending the narrow remedies of the common law, in order to prevent circuity of action and suppress multiplicity of litigation, introduced the principle into their system from the civil law, where it existed under the name of compensation. This method of settling cross demands in one suit, when once introduced, recommended itself so strongly by its natural equity and practical usefulness, that it was ultimately adopted, to a limited extent, both in England and the United States, in various statutes of set-off, and still further, in our own state, by the statute in relation to the failure of consideration. These acts concerning set-off, however, only recognize the right of persons mutually indebted to one another in ascertained amounts, under independent contracts, to set-off their respective debts by way of mutual deduction, so that in any action brought for the larger sum, the residue only should be recovered; and so excluded from their operation claims for unliquidated damages, occasioned either by wrongs done or obligations violated. These were left to the common law, and the same reasons that forced the doctrine, to a partial extent, into the statute law of the land, still continuing to operate, the old doctrine of recoupment has been recently greatly extended in its practical application.

In Dyer's Rep. (2-6,) it is laid down in the reign of Henry VIII: "If a man disseize me of land, out of which a rent charge is issuant, which has been in arrears for several years, and the disseisor pay it, if the disseisee recover in our assise, the rent that the disseisor paid shall be recouped in damages."

Again, in Coulter's case, (5 Rep. 2-31,) it is said: "And as to the case of recouper in damages, in the case of rent service, charge or seek, it was resolved that the reason of the recouper in such case is, because otherwise, when the disseisee re-enters, the arrearages of the rent service, charge or seek would be revived, and therefore, to avoid circuity of action, and "*circuitus est evitandus, et boni judicis est lites dirimere,*

ne lis ex lite oriatur," the arrearages during the disseisin shall be recouped in damages."

Pullen v. Stamford, (11 East, 232,) was an action on a policy of insurance, upon a voyage to Russia, with a provision that, if the cargo were denied permission to be landed, the master should, on his return, receive in London 2,500 pounds. The outward cargo was denied landing, but the master, instead of returning direct, went by Stockholm and earned freight. The master claimed the 2,500 pounds, but the freight earned was recouped out of the sum agreed to be paid.

In Barbour's law of set-off, (26,) it is laid down that "there is a species of defence somewhat analogous to set-off in character, which a defendant, in some cases, is allowed to make, and which is called recoupment. This is where the defence is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupment of damages, the loss sustained by him through the negligence of the person employed, and so in regard to a breach of warranty." Recoupment, in its origin, we are told, (Sedgwick on Dam. 3d ed., 431,) was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as he alleged;" and Viner's Abridgment, tit. "Discount," (3, 4, 9, 10,) is referred to as authority.

The American cases, however, at least in New York, Massachusetts, Alabama, and some few other states, now go the full length of declaring that all matters of counter claim, arising out of the same transaction, and not technically the subject of set-off, can be set off by way of recoupment of damages, provided the defendant has been properly apprised of the defence, and these cases will now be briefly referred to.

In a suit for the price of goods sold, (*McAlister v. Reab*, 4 Wend. 483,) and same case, (8 Wend. 109, in error,) the

damages occasioned by a breach of the warranty were received in diminution of the price. Mr. Chancellor Walworth said: "I consider the rule adopted on this subject perfectly just and equitable, when the defendant has notice of the defence intended to be set up, and calculated to do complete justice between the parties, without putting them to the expense of two suits, when one is much more likely to effect the object of fair litigation. Indeed, if one of the parties is insolvent, it is the only way in which justice can be done; at least as to small demands that will not bear the expense of a suit in chancery to obtain an equitable set-off."

In a suit for the contract price of building a wall, (*Jose v. Van Eps*, 22 Wend. 155,) the defendant was allowed to diminish the amount of the plaintiff's recovery by his own damages, sustained on account of the plaintiff's failure to construct the wall according to his covenant.

In a suit upon a note for the price of wood sold, (*Bollerton v. Purce*, 3 Hill, 171,) the defendant was allowed, out of the price to be recovered, the damages sustained in the destruction of part of the wood by a fire against which the vendor had guarantied. Upon a motion for a new trial, Bronson, Justice, said: "It is not a question of set-off, as the plaintiff's counsel seems to suppose, but of recoupment of damages. When the demands of both parties spring out of the same contract or transaction, the defendant may recoup, although the damages on both sides are unliquidated; but he can only set-off when the demands of both parties are liquidated or capable of being ascertained by calculation." To the objection that the damages claimed did not spring out of the contract of sale, but arose under a collateral agreement to indemnify against fire, it was said "that, although there could be no recoupment by setting up the breach of an independent contract on the part of the plaintiff, here the bargain was one and the same."

In *Allan v. Whitney*, (1 Hill, 484, and 1 Comst. 305,) in a suit for rent, the lessee set off the damages sustained by reason of the lessor's representation that the leased premises

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embraced ground afterwards ascertained to belong to another, and the amount recouped was the rent paid for the use of the ground.

In a suit upon a bond for the price of land sold, (*Van Eps v. Harrison*, 5 Hill, 6,) the buyer set-off his damages occasioned by the vendor's fraud in the sale; and to the same effect is *McCullough v. Cox*, (6 Barb. Sup. Ct. Rep. 386.)

The same liberal doctrine has been adopted in Massachusetts. In a suit by a factor, (*Dodge v. Tileston*, 12 Pick. 329,) to recover against his principal, the defendant was allowed to set up the plaintiff's negligence in selling the defendant's goods by way of diminishing the damages; and after reviewing the cases, the court said: "The question, for a time, may have ranked in the class of legal uncertainties, but it appears to us at present to be settled on reasonable and satisfactory principles."

In *Hunt v. Otis*, (4 Met. 464,) the plaintiff sued for his wages, and the company were allowed to set off their damages sustained by reason of the plaintiff's leaving their service, contrary to an implied stipulation to give them four weeks' notice of an intention to quit.

It is received also, in its largest extent, in Alabama. In *Hatchett v. Gibson*, (13 Ala. Rep., new series, 587,) a warehouseman sued for advancements made on cotton deposited with him, and the defendant was allowed to set off, by way of recoupment, the damages he had sustained by the destruction of his cotton through the plaintiff's negligence. The court say: "The contract between the parties was, that the latter should deposit his cotton in the warehouse of the former, and that the plaintiff should advance on it, retaining a lien for his reimbursement. To this contract, the law tacitly annexed the stipulation that the plaintiff should take ordinary care in its preservation, and if he did not, would pay the defendant for any loss resulting from neglect. These several stipulations, although they may embrace distinct duties and obligations, constitute one entire contract. This is sufficiently shown by their mere statement, and the breach of any undertaking on the part

of the plaintiff, by which the defendant sustained damage, would furnish a proper ground of recoupment in the present action, which is brought to recover back the advances made by the warehouseman."

Several of the states, however, have not yet carried the doctrine to the extent that it has been carried in the states to whose decisions we have referred, although the decisions in all the states are evidently tending rapidly that way, and the English courts, much less inclined than our own, to relax old rules, have, as yet, fallen far short of the American decisions. They now hold, however, contrary to their decisions prior to *Basten v. Butter*, (7 East, 479,) that, upon a sale or a special contract for work, at a specific price, the defendant may show, in diminution of the amount to be recovered, a breach of warranty or the failure of the contractor to do the work as required; and in *Mandell v. Steel*, decided in 1841, (8 Mees. & Welsb. 858,) Parke, Baron, addressing himself to this subject, remarked: "Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel sold with warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent." "But after the case of *Basten v. Butter*, a different practice, which had been partially adopted before in the case of *King v. Basten*, began to prevail, and being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty, in the one case, and the work, in consequence of the non-performance of the contract, in the other, were diminished in value. It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above mentioned, as it

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is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner, or goods to be delivered according to a sample, where the party may refuse to receive, or may return, in a reasonable time, if the article is not such as bargained for; for, in these cases, the acceptance or non-return affords evidence of a new contract on a *quantum valebat*. It must, however, be considered that, in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established, and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself, by showing how much less the subject matter of the action was worth by reason of the breach of contract."

How far this court would feel itself bound to go, in allowing counter claims, springing out of the same transaction, to be set up in diminution of the damages to be recovered, cannot now be determined. We are only to apply the law to the cases that come before us for judgment, and to that extent only are the decisions we make binding as authority upon ourselves or others. In the present instance, however, we have no hesitation in declaring that the rejected evidence ought to have been retained and allowed to go to the jury. Of course, our opinion is predicated upon the supposition that the cases removed were fixtures embraced in the sale, and removed by the plaintiffs after the bargain and before the formal transfer of the property, without the knowledge and against the will of the purchaser, and appropriated to their own use. In *House v. Marshall*, (18 Mo. Rep. 368,) the damages sustained by a purchaser of land, by reason of the fraudulent representations of the seller during the treaty, were allowed to be set up in diminution of the price sought to be recovered; and although the conduct of the present plaintiff, in removing the cases, acting, as we suppose he did, upon the ground that they were not fixtures, cannot be

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characterized as fraudulent, in any odious sense of the word, yet it resulted, if the facts were as the defendant maintains, in the same injury to his rights, and entitles him to the same remedy. The other judges concurring, the judgment is reversed and the cause remanded.

CHOUTEAU, Respondent, vs. NUCKOLLS, Appellant.

1. A judgment rendered in a court of one county, in a cause taken by a second change of venue *by consent of parties* from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding.
2. Under the act of congress approved July 4, 1840, the liens of judgments and decrees rendered in the United States circuit and district courts within each state, continue for the same period as the liens of judgments and decrees of the state courts.
3. The pendency of a writ of error in the supreme court of the United States does not affect the duration of the lien of a judgment of the circuit court.
4. Under execution upon a judgment of a state court, real estate was sold to A., being at the time subject to the lien of a judgment of the United States circuit court. After the lien of the latter judgment expired, execution upon it issued, under which the same real estate was sold to B. *Held*, A. had the better title.
5. Smallness of consideration in a sheriff's deed, of itself, under the circumstances of the case *held* not sufficient to affect a purchaser from the sheriff's vendee, with notice of fraud in the title of his vendor.
6. It being important to know whether a purchaser for value of real estate had notice of fraud vitiating the title of his vendor, the court trying the case without a jury must explicitly find upon this point.

Appeal from Franklin Circuit Court.

This was an action for the possession of several congressional subdivisions of land in Franklin county, both parties claiming title under Charles Gratiot, the patentee, the plaintiff under an execution sale upon a judgment of the United States Circuit Court for the district of Missouri, and the defendant under an execution sale upon a judgment of the Circuit Court of Warren county.

The judgment of the United States Circuit Court against Gra-

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tiot was rendered April 29th, 1843, for the sum of \$29,126 43, upon which execution issued dated August 25th, 1847, under which the land in controversy was sold by the United States marshal on the 28th of September, 1847, and bid off by the United States of America for the sum of \$1400, who, on the same day, received a deed from the marshal. On the 2d of July, 1851, the land was by the United States conveyed to the plaintiff for a consideration named in the deed, of \$1862 05. The execution, which is made a part of the marshal's deed, recites that it was issued pursuant to an order of the Circuit Court made on the 6th of October, 1846, in conformity with a special mandate of the Supreme Court of the United States.

The judgment of the Warren Circuit Court was rendered April 22, 1844, for costs in an ejectment suit begun by Gratiot in Franklin county, taken by change of venue to Gasconade county, and thence by consent of parties to Warren county, where the plaintiff was nonsuited by reason of his failure to appear. Execution for the costs was issued against Gratiot, dated September 10th, 1844, and directed to the sheriff of Franklin county, under which the land in controversy, with other land, was sold April 21st, 1845, and James C. Robertson became the purchaser of the whole at the price of \$3 25. He received from the sheriff a deed dated April 23d, 1845, in which the price bid was named as the consideration. On the 12th of May, 1852, Robertson's administrator, after a sale according to law, conveyed the land sued for, with more, to John Q. Dickinson, for a consideration named in the deed of \$86 95, who, on the 20th of November following, conveyed an undivided half to the defendant, Nuckolls, for a consideration named in the deed of \$82 20.

The plaintiff produced a witness who stated that, at the time of the sheriff's sale to Robertson, he was living upon the Gratiot claim and wished to buy one forty acre tract; that he inquired of the sheriff and Robertson as to the day upon which the sale would take place; that he went to town on the day named by them, but found that the sale had taken place the day

before. Another witness stated that, as he was trying, three or four days before the sale, with the assistance of his brother, to read an advertisement of the sale posted up at Walker's mill, Robertson came up and tore it down, saying it was of no further use, and putting up some other paper in its place, the purport of which witness did not know, as he could not read. The same witness attended the sale, with a view to buy a tract adjoining the one upon which he lived. He asked the sheriff to notify him when the tract he wanted was put up. The sheriff replied that he was selling it in larger parcels than witness wanted, and besides, that he would be buying a law suit, as there was a judgment of the United States Court which was a lien upon the land. Witness recollected this fact when his attention was called to it, and did not bid on the land.

There was evidence, (which was excepted to by the defendant,) that the plaintiff attended the sale by Robertson's administrator, and gave public notice that the title was in him; but the witness did not know whether Dickinson was then in hearing or not.

Upon these facts, the Circuit Court, trying the case without a jury, declared to law to be that the sheriff's deed to Robertson was fraudulent and void, and that it exhibited upon its face evidence of fraud which imparted notice to the defendant, and that the plaintiff's was the better title. The defendant appealed.

M. Frissell, for appellant. 1. If plaintiff relied upon the fact that the deed from the sheriff to Robertson was fraudulent, he should have instituted a suit to set aside that deed. 2. Smallness of consideration in a deed has never of itself been considered sufficient evidence of fraud in any case. (*Livingston v. Bryan*, 11 Johns. 565. *Den v. Zellers*; 2 Halstead, 153. *Cooper v. Gilbraith*, 3 Washington, 557.) But in this case, even if it had been sufficient to put the purchaser upon inquiry, he would have found an explanation, when he discovered that the land was sold subject to the lien of a judgment for some \$30,000. (*Fletcher v. Peck*, 6 Cranch, 133. *Dex-*

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ter v. Harris, 2 Mason, 538.) The notice given by Chouteau at the administration sale amounted to nothing more than would the putting of his deed upon record. He merely claimed that his was the better title, but said nothing about any *fraud* behind the apparent title of Robertson. 3. The lien of judgments and decrees of United States Circuit and District Courts within any state ceases at the same time as the lien of judgments of the state courts. (5 U. S. S. at Large, p. 393, sec. 4.)

Jones and Stevenson, for respondent. 1. The judgment of the Warren Circuit Court, under which defendant claims title, was void, that court having no jurisdiction of the cause. 2. If this were otherwise, still the plaintiff has the better title under the judgment of the United States Circuit Court, that being the elder lien. 3. The sheriff's sale at which Robertson purchased was void, because the land was sold in a body and not divided into parcels, as required by law. 4. The sale to Robertson was vitiated by fraud, and the smallness of the consideration named in the sheriff's deed was sufficient notice of it to all purchasers. 5. As to the lien of judgments of the United States Courts, see *United States v. Duncan*, 12 Illinois, 523. *Clements v. Berry*, 11 Howard, (U. S.) 398. *Meyer v. Campbell*. 12 Mo. Rep. 603.

SCOTT, Judge, delivered the opinion of the court.

1. There were no such irregularities in the suit which resulted in a judgment for costs against Gratiot in favor of Robertson, as would render it a nullity. The judgment was rendered by a court of general jurisdiction, to which the cause, it appears, had been transferred, with the consent of both parties. It was regularly in the Gasconade Circuit Court by a change of venue from Franklin county. From Gasconade, it was transferred to Warren county by consent of parties, where the final judgment was rendered. This was, no doubt, erroneous; but it is not for error alone that a judgment of a court of general jurisdiction can be treated as a nullity in a collateral proceeding.

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For error, a judgment must be reversed on appeal or writ of error, and if a party forgoes this method of correcting the errors of a judgment, he cannot afterwards set them up in avoidance of it, in a collateral action. If the party, by his conduct, had barred himself of his writ of error, the irregularity might have been corrected by the Circuit Court of Warren county, on motion.

2. The United States, on the 29th April, 1843, recovered judgment against Charles Gratiot, for the sum of \$29,126 93, under which the land in controversy was sold on the 28th September, 1847. The fourth section of the act entitled an act in addition to the "acts respecting the judicial system of the United States," approved July 4th, 1840, declares that judgments and decrees hereafter rendered in the circuit and district courts of the United States within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state now cease by law to be liens thereon. The lien of this judgment expired then, in April, 1846, as by our law three years is the duration of the lien of a judgment.

3. The pendency of a writ of error in the Supreme Court of the United States, on the judgment against Gratiot, did not affect the duration of the lien. The affirmance of that judgment would not prolong its existence, nor would the pendency of the writ continue the lien until the time of affirmance. This we consider plain from the words of the act creating the lien.

4. Execution was issued on the judgment obtained in the Warren Circuit Court against Gratiot, and on the 24th September, 1844, was placed in the hands of the sheriff of Franklin county, and was levied on the following day, and the land in controversy sold by virtue of said levy on the 21st April, 1845. From this statement of facts, it follows that the land was sold with the lien of the judgment of the United States upon it; but as the United States permitted the lien of their judgment to expire before the land was sold under their execution, the pur-

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chaser under the execution from the state court obtained the elder legal title.

5. The remaining question in the cause is, as to the fraud in conducting the sheriff's sale. No doubt the evidence of fraud was sufficient to avoid the sale, as to Robertson, the purchaser; but the land since has gone into the possession of those who claim that they are purchasers in good faith for value, without notice, and cannot be disturbed in the enjoyment of rights thus obtained. We do not consider that the deed, on its face, bears any evidence of fraud. The smallness of the consideration is not of itself evidence of fraud. It is a circumstance that may be weighed along with others, in determining the question of fraud, but of itself it does not show fraud. The fact that the land was subject to the lien of the United States judgment may have had its influence on the sale.

6. We consider the finding of the court insufficient on the subject of fraud. The finding should have stated explicitly whether the defendant was affected with notice of the fraud of those through whom he claimed the land in controversy.

We see no objection to the admission in evidence of the declaration made by Chouteau at the administrator's sale. It is not sufficient however that such declaration should have been made; it should also appear that notice of it came to the defendant.

With the concurrence of the other judges, the judgment will be reversed, and the cause remanded.

HOBEGIN, Respondent, *vs.* MURPHY, Appellant.

1. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.*
2. The omission to give the required notice, even in those cases where it is necessary, would not *ipso facto* render the sale void, but the party injured

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For error, a judgment must be reversed on appeal or writ of error, and if a party forgoes this method of correcting the errors of a judgment, he cannot afterwards set them up in avoidance of it, in a collateral action. If the party, by his conduct, had barred himself of his writ of error, the irregularity might have been corrected by the Circuit Court of Warren county, on motion.

2. The United States, on the 29th April, 1843, recovered judgment against Charles Gratiot, for the sum of \$29,126 98, under which the land in controversy was sold on the 28th September, 1847. The fourth section of the act entitled an act in addition to the "acts respecting the judicial system of the United States," approved July 4th, 1840, declares that judgments and decrees hereafter rendered in the circuit and district courts of the United States within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state now cease by law to be liens thereon. The lien of this judgment expired then, in April, 1846, as by our law three years is the duration of the lien of a judgment.

3. The pendency of a writ of error in the Supreme Court of the United States, on the judgment against Gratiot, did not affect the duration of the lien. The affirmance of that judgment would not prolong its existence, nor would the pendency of the writ continue the lien until the time of affirmance. This we consider plain from the words of the act creating the lien.

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chaser under the execution from the state court obtained the elder legal title.

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6. We consider the finding of the court insufficient on the subject of fraud. The finding should have stated explicitly whether the defendant was affected with notice of the fraud of those through whom he claimed the land in controversy.

We see no objection to the admission in evidence of the declaration made by Chouteau at the administrator's sale. It is not sufficient however that such declaration should have been made; it should also appear that notice of it came to the defendant.

With the concurrence of the other judges, the judgment will be reversed, and the cause remanded.

HOBEIN, Respondent, *vs.* MURPHY, Appellant.

1. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.*
2. The omission to give the required notice, even in those cases where it is necessary, would not *ipso facto* render the sale void, but the party injured

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would have relief according to circumstances. If the party whose duty it was to give the notice had acquired the title, the sale might be set aside in a direct proceeding, and the property restored. If a fair purchaser had paid the price and received a conveyance, the remedy would be confined to pecuniary damages against the wrong doer.

Appeal from Franklin Circuit Court.

This was a petition filed in 1854, praying the Circuit Court to set aside a sheriff's deed to Murphy for land in Franklin county, sold under a special execution against the plaintiff upon a judgment of foreclosure of a mortgage. The sale took place October 3, 1850, and the sheriff's deed was dated March 24, 1851.

It was admitted that, at the time of the sale, the plaintiff was a resident of St. Louis county, and had no notice of the issuing of the execution under which the sale took place. The Circuit Court thereupon rendered judgment setting aside the sheriff's deed, but requiring plaintiff to refund to Murphy the amount of his bid. From this judgment, Murphy appealed.

N. Holmes, for appellant, insisted that no notice was necessary, a sale under a judgment of foreclosure not being within the meaning of the act requiring notice; also that the act did not apply where the land was in the same county where the judgment was rendered.

Stevenson and Delafield, for respondent.

LEONARD, Judge, delivered the opinion of the court.

1. The notice of execution required by the act of 12th March, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land made under a special *fiery facias*.

Although the language of the statute is general, embracing in its words all execution sales of land situated in a different county from that in which the judgment debtor resides, we

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think it must be limited in its operation to cases falling within the mischief intended to be remedied; and that this is clearly not a sale of that character. Debtors frequently own land in different counties of the state, and creditors, not for the purpose of collecting their debts, but in order secretly to purchase their debtor's land at a sacrifice, sent their executions to distant counties upon errands of speculation, and buying there without competition, got landed property for a mere nominal consideration; and to suppress such frauds, this notice to the debtor was required.

It is true that the debtor can always protect himself by paying what he owes; but the legislature have thought proper to provide this additional protection against what they considered unfair conduct on the part of the creditor, and it is our duty to give proper effect to the provision, without, however, extending it to cases which, although perhaps within its words, are certainly not within its spirit. The defendant in this execution knew, for such was the general law, that this land must be sold under this judgment before any other property could be touched by it, and that the sale could take place only in the county of Franklin. The material fact, then, required by the legislature to be communicated to the debtor, in what county the creditor elected to subject his debtor's land to execution, was already known to him, and therefore there is no reason for our considering such a case as falling within the requirements of the statute.

2. We think proper to remark here that we consider this provision as merely directory, even in the cases to which it is applicable, so that the omission to give the required notice would not *ipso facto* annul the conveyance, but proper relief would be administered to the party injured according to the circumstances of the case. If the party whose duty it was to give the notice had acquired the title, there would seem to be no reason why, in a direct proceeding against him for that purpose, the sale should not be set aside and the property restored; and when this relief could not be had, on account of the interposition of

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a fair purchaser, who had paid the price and received the conveyance, the remedy would necessarily be confined to pecuniary damages, assessed against the wrong doer.

For the reason given, however, this judgment must be reversed; but we shall remand the cause in order to give the plaintiff an opportunity of applying for leave to amend, if he so desires, and has any other ground that will entitle him to the relief he seeks. The other judges concurring, the judgment is reversed, and the cause remanded.

HOBEGIN & WIFE, Respondents, vs. DREWELL, Appellant.

1. *Hobein v. Murphy*, ante, affirmed.

Appeal from Franklin Circuit Court.

Action by the assignees against the maker of a note negotiable under the statute, but not assigned for value.

The defence was, that the note was given for the purchase money of land conveyed to the defendant by a deed containing a covenant of general warranty, which passed no title.

A judgment was rendered against Hobein before a justice of the peace on the 30th of September, 1843, a transcript of which was filed in the Circuit Court, January 1st, 1844. On the 25th of August, 1847, after the lien of the judgment had expired, execution issued, under which the land was sold, and a sheriff's deed executed to the purchaser. This was the title acquired by the defendant.

On the 1st of February, 1847, Hobein executed a mortgage of the land, which was afterwards foreclosed, the land sold under a special *fi. fa.* and a sheriff's deed executed to Murphy, the purchaser. This deed the defendant offered in evidence, to show in Murphy a title superior to the one acquired by him; but it was rejected, the court having previously, in a suit by

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Hobein against Murphy, set it aside as void for want of notice of the execution to Hobein, who resided in another county. After a judgment for the plaintiffs for the amount of the note, the defendant appealed.

N. Holmes, for appellant.

Delafield, Jones and Stevenson for respondent.

LEONARD, Judge, delivered the opinion of the court.

The objection to a recovery on the note here sued upon is, that it was given for the price of land sold, and that the purchaser acquired no title, the vendor having none himself.

The objection to the title was, that the party had acquired it under an execution sale upon a general judgment against the owner, who had previously mortgaged it to another, and that the mortgage had been foreclosed and the land sold under a special *fi. fa.* and bought in by a stranger, in whose hands the title was still outstanding.

The reply to this was, that the sale was void for want of the notice of execution required by the act of the 12th March, 1849, and upon this ground, the court rejected the sheriff's deed under the *fi. fa.* when offered by the defendant, having previously so decided at the same term, in a direct proceeding by Hobein against Murphy, instituted to set aside the deed for that cause.

This point, however, has been decided otherwise here at the present term, reversing the judgment of the Franklin Circuit Court in the case referred to, and the present judgment must therefore also be reversed, on account of the rejection of this deed, and the cause remanded.

The other judges concurring, it is so ordered.

CAHILL, Respondent, *vs.* RAGAN, Appellant.

1. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor.

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Appeal from Franklin Circuit Court.

This was an action commenced before a justice of the peace, for the board of certain hands employed on section nine of the Pacific railroad, upon which the defendant and one Farrar were principal contractors. At the trial in the Circuit Court on appeal, there was evidence tending to show that one Clifford, who had quit work and run away, was a *sub-contractor* under Ragan and Farrar upon section nine. Plaintiff was what was called a boarding boss on this section. There was evidence tending to show that Clifford employed the hands and boarding bosses; but a witness testified that the defendant had said he was accountable for the wages of any hands who worked under Clifford. The defendant himself was seldom upon this section of the road while the work was going on. A witness testified that plaintiff had stated that *Clifford* employed him to board the hands. Another witness stated that the hands were to receive \$1 25 and \$1 40 per day, and their board was to be paid out of their day's wages; and that the general custom was for the boarding bosses to look to contractors for the board of hands. There was no evidence whatever that the defendant employed plaintiff to board the hands, further than can be implied in what is before stated. Upon this state of the evidence, the court below gave, among others, the following instruction, being the first of those asked by the plaintiff: "If the jury find that Ragan & Farrar had the contract on section nine of the Pacific railroad, and that plaintiff boarded the hands upon said section, they must find for plaintiff, unless the defendants show that Clifford was a sub-contractor, and they had no interest in the work done by plaintiff." It seems from the record to have been contended by the plaintiff in the court below, that Clifford was not an independent sub-contractor, but merely an agent of the contractors, to superintend the work, employ hands and boarding bosses. There was a verdict for the plaintiff.

J. D. Stevenson, for appellant.

C. Jones, for respondent.

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SCOTT, Judge, delivered the opinion of the court.

As there was evidence in the cause that Clifford was a sub-contractor under Ragan & Farrar, he was primarily liable for the board of the laborers employed on that portion of the road he had undertaken to build. The first instruction given for the plaintiff is based on the assumption that Ragan & Farrar were primarily liable, which is not warranted by the evidence. It was for the jury to determine who was primarily liable. Had Ragan & Farrar made themselves liable in the first instance for the board, the instruction would have been correct; but as the case was developed in evidence, the court was not warranted in throwing the burden of proof on the defendant. As it stood, it was the duty of the plaintiff to show that the defendant had made himself liable. The mere circumstance that Ragan & Farrar had the contract on section nine of the Pacific Railroad, was not sufficient to warrant the assumption that they were personally liable for the board of hands employed to work upon it, especially as there was evidence of a sub-letting by them.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

CLOHECY, Respondent, *vs.* RAGAN, Appellant.

1. It has been repeatedly held that the practice act of 1849, (except the 25th article,) does not apply to the trial in the appellate court of a cause appealed from a justice of the peace; but the old practice must still be observed. No finding of facts is necessary. Declarations of law must be asked, and the material evidence preserved in a bill of exceptions; otherwise, the case will not be reviewed in the supreme court.

Appeal from Franklin Circuit Court.

Action commenced before a justice of the peace for the board of hands employed on section nine of the Pacific railroad, tried in the Circuit Court on appeal without a jury. There is a bill

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of exceptions in the record, which contains a finding of the facts by the court, and a motion for a review setting out the evidence. The finding states that the hands were employed by one Clifford, who was ostensibly a sub-contractor under the defendant, the original contractor; but that in reality Clifford was only defendant's agent or secret partner, and so the latter was liable in this action. No declarations of law were asked and none given. The defendant appealed from the judgment against him.

J. D. Stevenson, for appellant. 1. The facts found were not warranted by the evidence. 2. The facts found do not warrant the judgment. The hands alone were liable for their board, and no one else.

C. Jones, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a suit begun before a justice of the peace, and taken by appeal to the Circuit Court, where it was tried by the court sitting as a jury, proceeding in conformity to the provisions of the present practice act.

It has been repeatedly held by this court that, except so far as it relates to the matter of evidence, the present practice act does not affect justices' courts. Indeed, this is the express enactment of the statute itself. It follows, therefore, that in the trial of appeals from justices' courts, the circuit courts must conform to the mode of procedure in use prior to the passage of the present practice act. When the court tries the cause as a jury, instructions must be asked, as formerly, as declarations of the law of the case. No finding of the facts is necessary. Upon an appeal to this court, the evidence deemed material and the instructions given and refused must be preserved in a bill of exceptions. This case, then, stands as one under the old practice, in which a trial has been had by the court and no instructions asked. Under such circumstances, the cause cannot be reviewed in this court. The judgment, therefore, will be affirmed, with the concurrence of the other judges.

Van Doren v. Relfe.

VAN DOREN, Respondent, vs. RELFE, Appellant.

1. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name.

Appeal from Washington Circuit Court.

This was an action brought in January, 1852, to recover damages for the breach of a covenant of seizin contained in a deed from Relfe to Vandoren for certain land, dated August 13, 1836.

The land was within what is known as the Iron Mountain tract, confirmed to Joseph Pratte by act of congress of July 4, 1836, and Relfe had no title at the time of his conveyance to Vandoren. On the 8th of May, 1838, Vandoren conveyed all his property of every description, including the land acquired of Relfe, and all his rights of action, to trustees for the benefit of creditors. In this conveyance, the trustees were by Vandoren appointed his "true and lawful attorneys irrevocable, *in his name or otherwise*, to ask, demand and recover and receive of and from all and every person or persons all goods, chattels, debts and demands, due, owing or belonging unto him, and in default of delivery or payment, to sue for the same." In 1842, Vandoren, after regular proceedings in the United States District Court in Ohio, received his discharge under the law of the United States for the relief of bankrupts, by virtue of which, all his property and rights of action were vested in assignees in bankruptcy.

The Circuit Court held that the beneficial interest in the claim for damages was in the trustees, unaffected by the subsequent proceedings in bankruptcy, and that by the terms of the deed to them, they could maintain a suit in the name of Vandoren. The defendant appealed.

J. W. Noell, for appellant, among other points, insisted that the suit was not brought in the name of the proper party.

M. Frissell, for respondent, insisted that the suit was properly brought. The covenant of seizin does not run with the land. The assignee of Vandoren could not sue, for the reason that the breach was consummated before the assignment. The creditors of Vandoren are the "real parties interested." But it would be very inconvenient, if not impracticable, to bring the suit in their names. A case like this is provided for in the last clause of section four of article thirty of the practice act of 1849.

SCOTT, Judge, delivered the opinion of the court.

The point relied upon by the defendant is, that this suit cannot be maintained in the name of Vandoren. There being no seizin in James H. Relfe, of the land conveyed by him to Vandoren, the covenant of seizin contained in Relfe's deed was broken immediately, and a right of action accrued thereon to Vandoren so soon as it was executed. So there was in Vandoren a right of action for unliquidated damages arising from a breach of contract. Vandoren afterwards assigned this right of action to trustees for the benefit of his creditors.

The requirement of the present practice act is, that every civil action must be prosecuted in the name of the real party in interest, with some exceptions. Among these is that of a suit by the trustees of an express trust. Now but for this exception, this suit must have been brought in the name of the creditors. There was no interest in Vandoren which would have warranted a suit in his name. This is not like those cases in which a note is expressly made payable to a person who holds that note for the benefit of others, as in the case of *Harney v. Dutcher*, in which it was held, that the payee of the note was the trustee of an express trust. (15 Mo. Rep. 89.) Here Vandoren is the mere owner of unliquidated damages which he has assigned away. He then is in the situation of the holder of an open account, who, after he assigns it away, cannot maintain an action upon it in his own name. (*Mauro v. Walker*, 18 Mo. Rep. 564.)

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If the right of action was not transferred to Vandoren's trustees, then it continued in him until his bankruptcy, when it passed to his assignee. So, in whatever light the matter may be viewed, Vandoren has no right to institute suit in his own name. With the concurrence of the other judges, the judgment will be reversed.

McILVAINE, Appellant, vs. HARRIS, Respondent.

64 Am. Dec. 196

1. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, verbally sold to the grantee; this being an *interest in land* within the statute of frauds.

Appeal from Washington Circuit Court.

This was an action commenced before a justice of the peace to recover the price of a crop of growing wheat alleged to have been sold to the defendant.

At the trial in the Circuit Court on appeal, the plaintiff offered to show the following facts: Early in March, 1852, he and the defendant made a verbal agreement, he to sell and the defendant to purchase a tract of land upon which he then resided, possession to be given the ensuing fall. Very soon afterwards, the agreement was modified, and defendant allowed to take possession immediately of a part of the dwelling house, and such portions of the farm as plaintiff had not at the time in cultivation. Plaintiff had a field of wheat sown the fall before, and had sown oats that spring. On the 30th of March, plaintiff executed to defendant a general warranty deed for the farm, but at the time made a reservation of his crops. He continued to use the parts reserved after the execution of the deed, and was allowed to cut and take away the oats without objection. Before the wheat matured, he sold it to the defendant on credit for the sum sued for.

Upon the production by the defendant of the deed from the

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plaintiff, containing no reservations, all the evidence offered by the plaintiff was excluded. He excepted, took a nonsuit and appealed to this court.

M. Frissell, for appellant. 1. A verbal reservation of possession of all or part of the premises conveyed, for some limited time, is binding. So is a reservation of a growing crop. 2. McIlvaine being in possession of the field upon which the wheat was sown, the delivery of the possession to defendant is a sufficient consideration to support the contract to pay for the wheat.

D. E. Perryman, for respondent. 1. The growing crop of wheat was a part of the freehold and passed by the deed. (Hilliard on Real Prop. 32. 1 Leigh, (Va.) 294. 3 Johnson, 216. 3 N. Hamp. 503. 3 Watts, 394. 7 id. 378. 4 Kent's Comm. 518, 519. 1 Greenl. Ev. 352.) 2. Parol evidence is not admissible to contradict a deed. (8 Mo. Rep. 161. Id. 391.)

SCOTT, Judge, delivered the opinion of the court.

1. Growing wheat is a part of the freehold and passes along with the land on which it is sown. The rule with regard to emblements, as stated by an accurate writer, is this : that, in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have the right to the soil for a time, for the purpose of further growth and profit of that which is the subject of sale, it is an interest in land, within the meaning of the statute of frauds, and must be proved by writing ; but when the thing is sold in prospect of separation from the soil immediately or within a convenient and reasonable time, without any stipulation for the beneficial use of the soil, but a mere license to enter and take it away, it is to be regarded substantially as a sale of goods, and so not within the statute ; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land. (Greenleaf's Cruise, vol. 1, p. 60.)

From the rule thus established, it is plain that growing wheat

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is an interest in land, and would pass by the deed which conveyed the land. Now no principle is better established than that which forbids the introduction of parol evidence to contradict or vary a deed. The evidence, if admitted, would have shown that an interest did not pass by the deed, which the law says did pass.

But as growing wheat is an interest in land, a contract concerning it is within the statute of frauds and perjuries, and must be in writing. It would follow, therefore, that parol evidence of the sale of a growing crop of wheat would be inadmissible. The judgment is affirmed. The other judges concur.

WOLF *et al.*, Defendants in Error, *vs.* ROBINSON *et al.*, Plaintiffs in Error.

1. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title.
2. The title of the purchaser at an administration sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding.

Error to Franklin Circuit Court.

This was a petition to obtain the legal title to certain real estate in the town of Washington.

Charles Eberius died in 1839, leaving the defendants his heirs at law. At the time of his death, he held a title bond for the property in controversy. After his death, the defendants, in a statutory proceeding against the administratrix of the obligor in the bond to enforce a specific performance, obtained a decree vesting in them the legal title. Afterwards, the administrator of Eberius, upon a petition to the county court, representing that the personal estate of the intestate was insufficient to pay his debts, and accompanied by the proper lists and inventories, obtained an order for the sale of the real estate.

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The plaintiffs claim by regular conveyances under the sale thus made, as to the regularity of which there was no dispute, except as hereinafter stated.

The above facts appear in the petition of the plaintiffs.

The defendants answered, admitting the material facts stated in the petition, but relying upon the decree as conclusive of their title, and alleging that no necessity existed for the sale by the administrator of Eberius, as the personal estate was sufficient to have paid all the debts of the intestate, if it had not been wasted.

This answer was stricken out; and a decree was afterwards entered vesting the legal title in the plaintiffs, according to the prayer of their petition. The defendants appealed.

J. D. Stevenson, for plaintiffs in error.

N. Holmes, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

1. The heirs of Eberius, by obtaining a decree for the legal title to the estate of which he died seized in equity, could not defeat nor affect the right of the administrator of Eberius to sell his equity in the land for the payment of the debts due by his intestate. This is no proceeding to invalidate the decree obtained by the heirs of Eberius, vesting them with the legal title to the land in controversy; so far from it, it affirms the validity of that decree, and seeks a conveyance of the title obtained by it.

2. There is nothing in the answer which affects the purchasers under the administrator's sale with notice of any irregularity in that proceeding. The county court had jurisdiction of the subject matter of the suit. A decree for the sale of the land was regularly pronounced, and it is not competent for the heirs, in a collateral proceeding, to contest the truth of the facts on which the order of sale was made. They should have appealed from the order, if it was not warranted by the circumstances. They cannot now gainsay the fact that the sale of the real estate was necessary for the payment of the debts. That matter has passed *in rem judicatam* and cannot now be con-

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troverted but for fraud, to which it must be shown that the plaintiffs were privy. That an administrator, by a maladministration of the assets of an estate, had rendered a sale of the real estate necessary for the payment of the debts, is no objection to the validity of a title acquired by a purchaser at such sale. A purchaser is not bound to maintain the truth of the facts on which an order of sale of the real estate of a decedent is based. With the concurrence of the other judges, the judgment will be affirmed.

GALE, Appellant, *vs.* MENSING. Respondent.

1. A conveyance by a trustee passes the *legal title*, although he may be guilty of a breach of trust.
2. The effect of the satisfaction of a mortgage is to extinguish the incumbrance upon the title, for the benefit of whoever is the owner of it at the time.
3. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it.

Appeal from Franklin Circuit Court.

Action for the possession of six lots in the town of Washington, claimed by the plaintiff under a sheriff's deed upon an execution sale, under a judgment against B. & A. King. Matthew Caldwell, the landlord of the defendant, also claimed title under the Kings.

The Circuit Court, trying the cause without a jury, found substantially the following facts :

On the 4th of June, 1838, the Kings mortgaged the lots in controversy to Matthew Caldwell to secure an indebtedness of \$300. On the 6th of June, 1838, they conveyed to C. S. Jeffries and W. V. N. Bay, trustees for the benefit of creditors, all their estate, real and personal, in law or equity, directing the mode and manner of sale and the proceedings of the trustees in the execution of the trust. The trustees were authorized to sell at public or private sale. By the terms of

this deed, it was necessary that the creditors should sign it, in order to receive any benefits under it. (This deed was not set out in the finding, nor were its provisions, further than above stated, nor did it appear in the record.) On the 3d of March, 1841, Bay and Jeffries conveyed the lots to Matthew Caldwell in consideration of an acknowledgment by him of satisfaction of the mortgage, which was entered upon the record on the same day. This deed recited that the lots were not worth more than the amount for which they were mortgaged to Caldwell, and therefore the trustees made the conveyance to avoid the expense of a foreclosure.

On the 20th of March, 1843, an alias execution issued upon a judgment recovered against the Kings, October 31st, 1838, under which these lots were levied upon and sold to the plaintiff on the 5th of April following.

Upon these facts, the Circuit Court gave judgment for the defendant, and the plaintiff appealed to this court.

J. W. Nobell, for appellant. 1. After the execution of the mortgage to Caldwell, and the deed of trust to Jeffries and Bay, the Kings still owned the equity of redemption, which Jeffries and Bay had no power to convey. 2. The sale by Jeffries and Bay to Caldwell was void. They had no power to give him the land in payment of his debt. All they could do was, to sell the land subject to Caldwell's mortgage, for the benefit of the creditors secured by the deed of trust. The execution of powers of sale by trustees must be in strict conformity to the terms of the trust. 3. The deed of trust to Bay and Jeffries, at the time of their conveyance to Caldwell, had, by its own terms, become a nullity. It was to operate in favor of those creditors only who should sign it, and no creditor has ever done this. (1 Hilliard on Mortgages, p. 245, §7, p. 438, §36. *Crow & Tevis v. Ruby*, 5 Mo. Rep. 484. *Swearingen v. Slicer*, 5 Mo. Rep. 241. *Gray & Howard v. Shaw*, 14 Mo. Rep. 341, and authorities there cited. 3 Wharton, 347.) 4. Caldwell's mortgage being satisfied, and the deed of trust to Jeffries and Bay being null and

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void by its own provisions and conditions, the full legal title was left in the two Kings, and it was purchased by plaintiff at sheriff's sale.

J. D. Stevenson, for respondent.

LEONARD, Judge, delivered the opinion of the court.

This petition was to recover the possession of land upon the legal title, and not for any equitable relief. The deed from the Kings to Jeffries and Bay was not a mortgage, but a conveyance of the whole title, subject only to Caldwell's mortgage, and it vested the legal ownership in the trustees against all persons except Caldwell and his assignees. So far as the record shows, this conveyance was not, as the appellant seems to suppose, a second mortgage, nor a mere naked authority to sell for the benefit of creditors ; but, as we have already remarked, a transfer of the legal ownership, upon the trusts declared in it, subject to Caldwell's mortgage.

It is not void as a mere matter of law, on account of the omission of the creditors to sign it, as they were required to do, in order to entitle them to any benefit under it, and there is no question saved in the record as to its invalidity on the score of fraud in fact. The consequence is, that their conveyance to Caldwell, in satisfaction of his mortgage debt, vested the entire legal ownership in him, and the subsequent satisfaction of the mortgage extinguished that incumbrance upon the title for the benefit of whoever was the owner of it, instead of returning that title to the Kings, who had previously parted with all their interest in the land by their deed to Jeffries and Bay.

There is no question here as to the mere legal propriety of the conduct of the trustees in conveying to Caldwell. Whether that act was a breach of duty for which they are liable to whoever were the beneficiaries of the property at that time, cannot be discussed in this record. It is sufficient here that the legal ownership was in them, and that they made the transfer to Caldwell, which we must presume was proper, and not a

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breach of trust, until it is so shown in a proper proceeding instituted against them for that purpose. The judgment is affirmed.

FERRIS' ADMINISTRATOR, Respondent, *vs.* HUNT, Appellant.

1. After the death of an administrator, plaintiff, a succeeding administrator was substituted as plaintiff, without the appearance of the defendant, or the service of a *scire facias*. The defendant afterwards appeared, and filed a motion to set aside the order of substitution, which being overruled, he appealed to the supreme court, where the order was set aside. *Held*, this was such an appearance by the defendant as dispensed with the necessity for a *scire facias* after the cause was remanded to bring him into court; being already in court, he might be required to show cause against the proposed substitution, and upon his failure to do so, the order might be renewed.

Appeal from Washington Circuit Court.

Action originally commenced before a justice of the peace in the name of Yates, administrator of Ferris, afterwards appealed to the Circuit Court, where, at the April term, 1853, Yates having died, Ashley, the succeeding administrator, was, on his motion, substituted as plaintiff, without the appearance of the defendant, or the service upon him of a *scire facias*. At the same term, judgment was rendered against the defendant, and he afterwards appeared and moved to set the same aside. His motion was overruled and he appealed to the supreme court, where the judgment was reversed and the cause remanded, on the ground that Ashley had been substituted as plaintiff, without the appearance of the defendant or a *scire facias* served upon him. (18 Mo. Rep. 480.) At the June term, 1854, of the Circuit Court, Ashley again moved for an order substituting him as plaintiff, having previously given the defendant notice of his intention so to do, but his motion was overruled, and he excepted. He then sued out a *scire facias*, returnable to the October term following. At the October term, the defendant appeared and moved to quash the *scire facias*, on the ground

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that it was sued out after the expiration of the third day of the second term next after the term at which the death of the original plaintiff was stated on the record. The motion was overruled, the court made an order substituting Ashley as plaintiff, and the case was called for trial. The defendant claimed a continuance, but it was not granted, and no further defence being made, judgment was rendered for the plaintiff, from which the defendant appeals.

Mr. *Noell*, for appellant, cited *Fine v. Gray*, (19 Mo. Rep. 33,) that the *scire facias* was too late.

LEONARD, Judge, delivered the opinion of the court.

The party's appearance in court and motion to set aside the order allowing the cause to be continued against him in the name of the deceased plaintiff's successor, was a sufficient appearance to have justified the court, upon setting that order aside, to require the party to show cause against the proposed substitution, and upon his failure to do so, to have renewed the order without any *scire facias* to bring him into court. When, therefore, the order was in effect set aside here, and the cause remanded for further proceedings, the court was then at liberty to proceed in the matter without a *scire facias*, the party being already in court—a party to this proceeding by his own voluntary appearance—and the proceeding to have the cause continued in the name of the present plaintiff may be considered as having been commenced on the day the party made his motion in court to set aside the order, and so is within the time allowed by the statute for that purpose.

The judgment is affirmed.

PERKINS, Respondent, vs. CARTER, Appellant.

1. The mere addition of the words, "*and relinquishes her dower,*" in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin v. Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.)

Appeal from Lincoln Circuit Court.

This action was brought by the heir of Sarah A. Perkins, to recover possession of a tract of land in Lincoln county. The defendant claimed title under a deed executed by Sarah A. Perkins (to whom the land was patented before her marriage) and her husband, Charles E. Perkins. The certificate of acknowledgment to this deed was as follows :

"State of Missouri, county of Lincoln, ss. Be it remembered that, on the 20th day of October, A. D. 1841, before me, the clerk of the county court of Lincoln county, Missouri, personally appeared Charles E. Perkins and Sarah Ann, his wife, both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as having executed the same, and severally acknowledged the same to be their own free act and deed for the purposes therein mentioned. The said Sarah Ann being first examined by me separate and apart from her said husband, first being made acquainted with the contents thereof, says she executed the same deed, *and relinquishes her right of dower to the land therein mentioned*, voluntarily and freely, of her own accord, without any undue influence of her said husband. Taken and certified and given under my hand and seal of office, the day and year above written.

(L. S.)

"FRANCIS PARKER, Clerk."

It did not appear in the body of the deed that the estate conveyed belonged to the wife. The Circuit Court held that it was insufficient to divest her title. After verdict and judgment for the plaintiff, the defendant appealed.

Mr. *Glover*, Mr. *Gantt* and Mr. *Polk*, for appellant, relied upon *Chauvin v. Wagner*, (18 Mo. Rep. 531.)

Mr. *Broadhead*, for respondent, attempted to distinguish this case from *Chauvin v. Wagner*, by the fact that here it did not appear in the deed itself, with the contents of which the wife was certified to have been made acquainted, that she was conveying her own estate.

SCOTT, Judge, delivered the opinion of the court.

This was an action brought by the respondent to recover possession of a tract of land claimed by her as the heir of her mother. From the form of the certificate of acknowledgment to the deed executed by the husband and wife, it will be seen that the same question arises in this case that was determined in the case of *Chauvin's Heirs v. Wagner*, (18 Mo. Rep. 531.) The matter there settled was, that the words, "*and relinquishes her dower to the real estate therein mentioned,*" contained in a certificate of acknowledgment of a married woman to a deed conveying her own estate, do not avoid the deed as to the wife.

After mature deliberation, the court has come to the conclusion, that an adherence to the opinion expressed in relation to this question, in the case to which reference has been made, will subserve the ends of justice and conduce to the security of titles to real estate, especially when consideration is made of the want of skill in many of those to whom, from necessity, the law has been compelled to entrust the power of receiving the acknowledgment of deeds.

Experience and observation show that the error, in all these cases, is not in doing the act—not in a failure to obtain the wife's consent in a suitable manner, but in a want of skill in certifying the manner in which it has been done.

If the case to which allusion has been made has gone farther than some others, yet, in spirit, it harmonizes with them, as all courts have felt themselves warranted in departing from the exact language prescribed by law, in order to uphold the conveyances of married women.

This question does not turn on the contents of the deed, but on the form of the certificate. The terms of the deed can impart no efficacy to the certificate, nor supply any of its defects. If the contents of the deed are sufficient to convey the estate proposed to be aliened, the only remaining inquiry is, as to the

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sufficiency of the certificate of acknowledgment. It can make no difference, then, whether it appears or not on the face of the deed that the land conveyed was the property of the wife.

The other judges concurring, the judgment will be reversed.

GIBBONS *et al.*, Appellants, *vs.* GENTRY, Respondent.

1. G. in Kentucky, in 1829, executed a deed for slaves to trustees, to be held, with their increase, for the benefit of G. and wife during their lives, and after their deaths to be divided among their children. This deed was acknowledged and recorded. The certificate of acknowledgment ran in the name of J. B., clerk of the county court, but was signed at the foot "J. B., by J. J. A., deputy clerk." G. remained in possession of the slaves, and shortly afterwards removed with them to Missouri, where he sold two of them to the defendant, who had notice of the deed, and the surviving trustee joined in the bill of sale. In a suit brought by the children of G., after the death of himself and wife, to recover the two slaves thus sold and their increase, *Held*,
1. That the deed was not void *upon its face* under the laws of Kentucky in force when it was executed, and that the acknowledgment was sufficient.
2. That the legal title not being in the plaintiffs, the suit was not properly brought; that it should have been in the name of the trustees, or if they were dead, or refused to accept the trust, the petition should have been framed for the appointment of trustees, or for the execution of the trust without their intervention.

Appeal from Marion Circuit Court.

This action was brought in 1851 by the children of Isaac B. Gibbons, to recover, upon the legal title, slaves claimed by them under a deed executed in Kentucky in 1829 by their father, since deceased, under whom also the defendant claimed by purchase in Missouri in 1831. The record showed the following facts:

On the 31st of July, 1829, Isaac B. Gibbons, then residing in Green county, Kentucky, executed a deed to Stanton Buckner, of Marion county, Missouri, and Richard A. Buckner, of Green county, Kentucky, for the slaves in controversy and

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others, to be held by them in trust for the support and maintenance of the grantor and his wife during their lives, and the education of their children, and after their death, to be divided among the children. This deed is set out at large in the opinion of the court, together with the certificate of acknowledgment and of record. It was acknowledged and recorded in Green county, Kentucky, September, 18, 1829, and in Marion county, Missouri, March 12, 1831. Gibbons remained in possession of the slaves after the execution of the deed, and in October or November of the same year, removed with them to Marion county, Missouri. The defendant offered evidence tending to show that Gibbons was largely indebted when he executed the deed; but there was other evidence tending to show that he paid all his debts in Kentucky, before removing to Missouri. It was in evidence that in July, 1829, Gibbons owned no other property of consequence than the slaves included in the deed. There was evidence tending to show that Richard A. Buckner, who died in 1848-9, in Kentucky, accepted the trust and acted under it; but that Stanton Buckner, the other trustee, who went to California, in 1850, had always refused to act.

After Gibbons removed to Missouri, he continued to remain in possession of the slaves, having but little other property. He contracted debts, judgments were recovered against him, and executions issued, which were levied upon some of the slaves. In March, 1831, he sold two of the slaves to the defendant, and with the price received paid off the executions and other debts contracted for the support and maintenance of his family before the Kentucky deed was recorded in Marion county. Before making the purchase, defendant heard of the Kentucky deed, and applied to Stanton Buckner for information, by whom he was told that the deed was of no effect, neither of the trustees having accepted the trust or acted under it, and Gibbons having always been in possession of the slaves. At the request of the defendant however, Stanton Buckner joined in the bill of sale, as did also Williams, the son-in-law of Gibbons, whose widow was one of the plaintiffs. The bill of sale

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to defendant was dated March 14, 1831, after the Kentucky deed was recorded in Marion county, but there was evidence that the purchase was made before that date. Gibbons afterwards removed to Arkansas, where he died in 1848, his wife having died some years prior to that date. This action was brought by his children to recover the two slaves sold to the defendant and their increase.

It was agreed that all the statutes of Kentucky bearing upon the questions in the case should be considered in evidence.

The Circuit Court refused all the instructions asked by the plaintiffs, and gave all asked by the defendant, including the following :

“If the jury believe from the evidence, that the defendant purchased the two slaves from Isaac B. Gibbons in 1831, and paid said Gibbons a fair price for said slaves, the deed under which the plaintiffs claim is void as to the defendant, and they ought to find a verdict for the defendant.

The plaintiffs submitted to a nonsuit, and appealed to this court.

Glover & Richardson, (with *Richmond*,) for appellants.

1. The deed of trust executed by Gibbons in 1829 was a valid deed, and vested in the trustees a remainder in the slaves to the use of the children of the grantor after the death of himself and wife. It was not void as immoral or contrary to public policy. (2 Kent, 352. 2 Black. 398. 3 Litt. (Ky.) Rep. 276. 7 Harr. & John. 257. 1 Humph. 273. 2 Yerger, 584. 9 Gill & John. 77. 1 Florida, 86. 13 Ala. 738, 748. 2 Brevard, 38. Id. 411. 5 Humph. 393. 1 Rawle, 349.) 2. All the statutory provisions in force in Kentucky, necessary to the validity of the deed, were complied with. It was acknowledged within eight months after it was executed, and recorded. (1 Morehead & Brown's Dig. p. 738-9.) 3. The trust for the children was fully established by the deed, whether the trustees accepted it or not. A trust is never allowed to fail for want of a trustee. 4. The deed was recorded in Marion county, Missouri, in due time; but it was not neces-

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sary that it should have been recorded there at all. The title once vested according to the laws of Kentucky, it could not afterwards be divested by way of forfeiture for non-compliance with further conditions. (13 Ala. 737, 742. 4 Humph. 211. Martin & Yerger's Rep. 102. 13 Pet. 106. 11 Mo. Rep. 556. Story on Conflict of Laws, p. 219, §263.) 5. The statute of limitations is no bar to the plaintiffs' claim, because their right of action did not accrue until the death of their father and mother. 6. It is said that this deed was void as a conveyance to the use of the grantor under the statutes 50 Edward III, ch. 6, and 3 Henry VII, ch. 4, which are alleged to have been in force in Kentucky when it was executed. But those statutes were never construed to avoid any deeds except such as were made with a fraudulent intent. (2 Reeves' Eng. Law, p. 401. 4 id. p. 140. Crabbe's Eng. Law, p. 440. 2 Kent, 440. *Trevor v. Trevor*, 1 P. Wm's, 621. *Glanville v. Payne*, 2 Atk. 39. 1 Eq. cases, abridged, top p. 39. *Scroggs v. Scroggs*, Ambler, 72. *Harvey & wife v. Ashley*, 3 Atk. 607. 2 Vernon, 702. *Holloway v. Headington*, 8 Simons, 324, (11 Eng. Ch. Rep. top p. 459.) 2 Vesey, jr. 331. 2 P. Wms, 349. *Davenport v. Bishop*, 2 Younge & Coll. 451. 2 Mylne & Craig, 376. 2 Irish Eq. Rep. 113. *Williams v. Williams*, 15 Vesey, 419. 4 Brown P. C. 580. 1 Cox Ch. Rep. 215. 7 Hare, 318. Atherly on Settlements. Cowp. 432. 4 Kent, 349.) It may be that merely passive or nominal trusts might be held to be within these statutes, but not active trusts. (5 Iredell, 578. Id. 255. 1 Hill, (S. C.) 413. 1 Dev. Eq. Rep. 359. 1 Johns. Ch. Rep. 54. 11 Paige, 136. 1 Sandf. Ch. Rep. 104. 4 Paige, 354.) Even if the conveyance to the use of Gibbons during his life should be held void under these statutes, it does not follow that the interests of the remaindermen must be held void also. 7. The deputy clerk of the county court had power to do all that the principal could do.

The following Kentucky statutes were referred to by the appellants as those upon which they relied: 1 Morehead &

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Brown's Dig. p. 429, tit. "Conveyances," top p. 432. Ib. 437, 443, 612, 734 to 741. 2 Ib. tit. "Slaves," p. 1471 to 1480 inclusive. 1 Ib. 175, 411.)

Pratt & Redd, for respondent. I. The deed under which plaintiffs claim, being a voluntary deed, was, as the law stood prior to the Kentucky statute of frauds, absolutely and *per se* void as to a subsequent purchaser for value, with or without notice. (2 Taunt. 82. 2 Black. Rep. 1021. 1 Bos. & Pull. 334. 2 Vesey, sr. 10. 1 Atk. 94, side p. 18 Vesey, jr. 89. Ib. 111. 1 Cowper, 280.) II. The law stood thus until the passage of the statute of frauds of 1798, (Littell & Swigert's Dig. p. 618,) and the 41st section of the act concerning "Slaves," (Littell & Swigert's Dig. 1158, 2 Morehead & Brown's Dig. 1479-80,) by which a voluntary deed might be shown to be good, by proof that it was legally acknowledged or proved and recorded within eight months. This deed was not legally acknowledged or proved. There was no law in force in Kentucky in 1829 which authorized a *deputy clerk* to take the proof of deeds. III. The plaintiffs can claim no title to these slaves under the deed of their father, for the following reasons: 1. They were disposed of by the grantor during his life for the support of himself and the plaintiffs, his children, and the deed can only take effect as to such as remained undisposed of at his death. 2. It was a conveyance *to the use* of the grantor who was largely in debt at the time. The statute 3 Henry VII, ch. 4, was in force in Kentucky at the date of the deed. 3. Admitting that the deed gives the plaintiffs an equity in the slaves, and that they might file a bill to enforce the trust, yet they cannot recover in this action, in which they sue for the possession. By the terms of the deed, the trustees alone were entitled to the possession.

RYLAND, Judge, delivered the opinion of the court.

Some time in July, 1829, Isaac B. Gibbons, the ancestor of the appellants, who then resided in Green county, in the state of Kentucky, having wasted a large portion of his estate by

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dissipation, made a deed to trustees, of which the following is a copy :

“ This indenture, made this 31st of July, 1829, between Isaac B. Gibbons, of the county of Green and state of Kentucky, of the one part, and Stanton Buckner, of the state of Missouri, and Richard A. Buckner, of the county of Green aforesaid, of the other part, witnesseth : That the said Isaac B. Gibbons, for the love, good will and affection which he has towards his children, Louisa B. Gibbons, Judith Presley Thornton Gibbons, Morris Gibbons, and Caroline Aylett Gibbons, and also for the consideration of one dollar, in hand paid, the receipt of which is acknowledged, hath granted, bargained, sold and delivered to the said Stanton Buckner and Richard A. Buckner, the following slaves, to-wit : Abram and Molly, his wife ; Ben, John, Spencer, Peter, Jack, Dick, Brent, George, Manuel, Spencer, (son of Nancy,) Lucinda, Nancy, Ellen, Maria, Lydia, (daughter of Lucinda,) and Jane, and their future increase : To have and to hold the said slaves and their increase to the intents, uses and purposes following, to-wit : That the said Stanton Buckner and Richard A. Buckner are to retain the title and possession of said slaves and their increase, and to permit the full benefit of their labor and hire to be applied to the support and maintenance of the said Isaac and his wife, for and during their natural lives, and for the support, maintenance and education of their said children. At any time that the said Gibbons and wife may choose to deliver any of said slaves to any one of their children before mentioned, on being requested by the said Gibbons and wife, the said trustees, jointly or separately, are to permit such child to take said slave or slaves so designated, and to charge them at a fair valuation to such child, taking care not to permit any child to take more than what may be supposed to be his or her equal part ; and at the death of said Gibbons and wife, whatever may still remain on hand, not so disposed of, is to be divided among the said children, so as to make their respective parts as nearly equal as possible. To Elizabeth L. Williams, daughter of

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said Isaac, he has already given a negro man named Robert, and a negro woman named Lydia, which were estimated at one thousand dollars at the time they were given. If the parts of said negroes and their increase, which may be given to each of said children named above, be more than equal to the value of the two given to said Elizabeth L. Williams, at the time they were so given, such child so receiving shall pay or secure to be paid to said Elizabeth, so much as will make the part of said Elizabeth equal to any one of the other children first named, or said part may be retained, so as to make said Elizabeth's equal to the respective parts of the other children, the design being to make all the children equal in their respective parts, including the said Elizabeth. In testimony whereof, the said Gibbons hereunto sets his hand and affixes his seal, the day and year first above written. "ISAAC B. GIBBONS, (seal.)"

"Test: Aylett Buckner, Arthur P. Buckner, Kentucky."

This deed was proved and recorded in the office of the clerk of the county court of Green county, Kentucky, in the manner shown by the following certificate endorsed thereon :

"I, John Barret, clerk of Green county court, do hereby certify that this deed of gift from Isaac B. Gibbons to Stanton Buckner and Richard A. Buckner, trustees for Louisa B. Gibbons, Judith Presley Thornton Gibbons, Morris Gibbons and Caroline Aylett Gibbons was, on the 31st day of July, 1829, presented to me in my office, and proven by the oath of Aylett and Arthur P. Buckner, the two subscribing witnesses thereto, to be the act and deed of the said Isaac B. Gibbons ; whereupon, the same, together with the foregoing certificate, is truly recorded in said office. Given under my hand this 18th of September, 1829.

"JOHN BARRET,

"By JAMES J. ALLEN, D. C."

Some time in March, 1831, the said deed was again acknowledged before Theodore Jones, recorder of Marion county in this state, and recorded in his office, in conformity to the laws of this state. Isaac B. Gibbons removed with his family from Green

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county, Kentucky, to Marion county, Missouri, in the fall of the year 1829, bringing with him the most of the slaves mentioned in the deed of trust.

After his reaching Missouri, he contracted debts, on which judgments were after a while obtained, and executions were had against him and levied on some of the said slaves.

On the 14th of March, 1831, I. B. Gibbons sold to the respondent, Moses Gentry, the negro woman, Nancy, one of the slaves in question, and her child, and with the consideration money received paid off the executions. Gentry immediately took possession of Nancy and her child, and has held them and other children, born of Nancy since, up to the commencement of this suit, which the plaintiffs bring, upon the ground that the sale to Gentry was in violation of the trust, and passed no title as against the appellants. Isaac B. Gibbons died in 1848, having survived his wife. Richard A. Buckner died in Kentucky in 1848 or '49.

The respondent stated in his answer that, prior to the purchase, he had heard of the deed of trust, and on inquiring of Stanton Buckner, was assured of its existence, but that said Buckner told him it was a sham business, prepared by the friends of Gibbons, who was addicted to drinking, to prevent his wasting his property. After this, he agreed to buy the negroes of Gibbons, if Buckner and Williams would join I. B. Gibbons in the bill of sale, which they did. Gentry insists, in his answer, that the deed of trust was never delivered, never legally acknowledged or recorded in Kentucky; denies that by such deed any interest passed to the appellants under the laws of Kentucky; that if said deed was executed, it was made with intent to defraud the creditors of Isaac B. Gibbons, who was indebted at the time. He insists that the bill of sale passed the title not only of Gibbons, but of his wife and children. He also relies on the statute of limitations of five years. On the trial, the appellants were forced to a nonsuit by the ruling of the court below.

On the argument in this court, several questions have been

made, which it is proper to notice; for, although the judgment below must be affirmed, on the ground of the suit not being brought by the proper parties, still it has been deemed by the court most advisable to give our views of some of these questions, should the parties interested see fit to renew the suit in proper mode hereafter.

From the ruling of the court below on several of the instructions asked, it is plainly to be seen that, in the opinion of that court, the deed of trust from Gibbons to the Buckners is void *per se*—void on its face. This, in the opinion of this court, is wrong; the deed is not void upon its face. No one will pretend to deny the power of Gibbons to convey this property to trustees for the benefit of his wife and children, if he had no creditors; and should have the deed acknowledged and recorded as the statute of Kentucky required. We will not pretend to give any opinion in relation to the statutes of 50 Edward III, ch. 6, and 3 Henry VII, ch. 4, being in force in Kentucky or not. Nor will we give any opinion of the laws of Kentucky bearing on this subject, further than to say that we consider the acknowledgment before the deputy clerk and his certificate sufficient. (*Moore v. Farrow*, 3 A. K. Marsh. 41.) We do not feel disposed to lay down the rules of law which may hereafter be invoked in this case; nor to express our opinion whether the intention expressed by the deed in question would be carried out by the principles of the common law or not. We say the deed is not fraudulent on the face of it—not a fraud *per se*; that it is properly acknowledged and certified by the deputy clerk; that the question of fraud made by the answer should have been submitted to the jury under proper instructions from the court.

There are cases certainly where it would be proper for the court to declare that a deed is fraudulent on its face. But the case should be a strong one to call for the exercise of this power. Fraud is so much a question of intention, so essentially a matter of fact, that it is better, in a majority of cases, to refer its existence or non-existence to the finding of a jury.

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The old doctrine of fraud *per se*, once so familiar, has been greatly modified, and the courts are growing less inclined to administer its hasty conclusions, always severe, and sometimes unjust. In this instance, there is nothing on the face of the deed showing fraud, or authorizing the court to declare it void. But it is entirely proper for the defendant to show, if he can, that, in point of fact, the deed was made with the fraudulent intent charged in his answer; also, if I. B. Gibbons did, soon after the execution of this deed, voluntarily pay off all his creditors, the fact ought to be received as competent evidence in reference to the motive with which he is charged in making the conveyance.

The plaintiffs show a deed of trust by which the legal title to the property appears not in them at least. Now these trustees, if they accepted the trust, must sue if they are alive. If they did not accept the trust, or will not sue, then the petition must be framed for the appointment of a trustee, or that the court shall direct the execution of the trust. These were the views entertained by this court at the last term, and should then have been given. However, I now deliver them as the opinion of Judge Scott, Judge Gamble and myself, the judges before whom the case was then argued.

The judgment of non-suit is affirmed.

MILLER, Appellant, vs. B. F. & J. THURMOND, Respondents.

1. Under the first section of the fourth article of the practice act of 1849, the jurisdiction of courts, in suits where land is the subject of litigation, depends exclusively upon the residence or presence of the parties, and not upon the location of the land. That section repeals the second section of the first article of the act concerning practice in chancery, (R. C. 1845.)

Appeal from Franklin Circuit Court.

Suit to obtain the legal title to land in Franklin county. The defendants filed a plea to the jurisdiction of the court, upon the hearing of which, it was admitted that one of the defend-

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ants resided in Green county, in this state, where the summons was served upon him, and the other in California; whereupon the suit was dismissed, and the plaintiff appealed.

Stevenson, for appellant. Suits concerning real estate must be brought in the county where the land or the greater part thereof is situate. (R. C. 1845, Practice in Chancery, art. 1, sec. 2.) This provision is not repealed by the new practice act. (Art. 30, sec. 4.)

C. Jones, for respondent.

LEONARD, Judge, delivered the opinion of the court.

Under our new practice act, (art. 4, sec. 1,) the jurisdiction of the court is made to depend exclusively upon the residence and presence of the parties, without any reference to the position of the land sued for, when land is the subject of the suit, and the consequence is, the old statute rule in relation to equity suits affecting real estate, prescribed by the second section of the first article of the revised chancery practice act of 1845, is repealed.

Here, one of the two defendants was a non-resident of the state, and the other resided in Green county, where he was served with process, and the suit was brought by a resident of Franklin county for land there. In such a case, by the express words of the law, the suit must be either in the county in which the resident defendant resides, or in the county in which the plaintiff resides, and the resident defendant is found; and here, of course, it was improperly brought in Franklin county, where, although the plaintiff resided, the defendant was not present to be served with process.

The judgment is affirmed.

PHELPS, Appellant, vs. RELFE, Respondent.

1. P. gave a note, with R. & E. as his sureties, to whom he executed a mortgage on real estate for their indemnity. R. & E. subsequently paid the note in equal proportions. E. afterwards purchased P.'s equity of redemption in the real estate under execution. There was an understanding between R. & E. that the purchase was on their joint account, but the deed was made to E. and it did not appear that R. was in a situation to enforce the agreement. In a suit by P. against R. for the statutory penalty for refusing to enter satisfaction of the mortgage, and to compel him to deliver up the note in his possession to be cancelled, *held*, that it could not be maintained.

Appeal from Washington Circuit Court.

This was an action brought to recover the statutory penalty for a refusal to enter satisfaction of a mortgage, and to compel the defendant to deliver up a note to be cancelled. The facts are stated in the opinion of the court.

M. Frissell, for appellant. The purchase under execution by Evans & Relfe of Phelps' equity of redemption extinguished the mortgage and with it the mortgage debt. (1 Hiliard on Mortgages, 329, §61, 330, §64. 2 Ib. p. 1 and 2.)

J. W. Nbell, for respondent. 1. As the mortgagor had no interest remaining in the mortgaged property, he could not be aggrieved by a failure to enter satisfaction. (R. C. 1835 and 1845, tit. "Mortgages.") 2. The facts shown do not constitute a satisfaction of the mortgage.

RYLAND, Judge, delivered the opinion of the court.

Some time in February, in the year eighteen hundred and thirty-four, the plaintiff, Timothy Phelps, borrowed of Washington county the sum of four hundred dollars, for the payment of which he executed his note, with James H. Relfe and James C. Johnson his sureties. At the same time, the plaintiff, in order to secure his said sureties, executed to them a mortgage on a certain tract of land situated in the county of Perry, containing two hundred and thirty-eight acres and nine-

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teen hundredths, originally confirmed to Noel Hornback, and numbered on the official plat 377. This mortgage was shortly after its date duly recorded in said county of Perry. James S. Evans was subsequently substituted for said James C. Johnson. In November, 1839, an execution was issued in favor of Austin H. Hawkins against the plaintiff, Phelps, and was by the sheriff of Perry county levied upon the land above described; and on the 23d of March, 1840, the said sheriff sold all the right, title and interest of the plaintiff in and to said land, and said James S. Evans, who had been substituted in place of the surety, Johnson, became the purchaser thereof. This purchase by Evans was with an understanding on the part of Relfe to be on their joint account. The deed was made to Evans alone. Relfe and Evans afterwards disagreeing in regard to the manner and terms of the purchase, Evans has never made Relfe any title to any part of the land, but retains the whole himself. The defendant, Relfe, and the said Evans have each paid one half of the amount due on the said note to the county of Washington. The defendant, Relfe, has never received any thing for the money which he paid to Washington county as surety for Phelps, unless the above purchase of Phelps' land by Evans is held to be such. The land, at the time of the purchase thereof by Evans, was supposed to be worth from eight to ten dollars per acre; but after the flood in the year eighteen hundred and forty-four, and down to the trial of this suit, was worth not more than two dollars and fifty cents per acre. On or about the 30th day of December, 1851, the plaintiff requested the defendant to enter satisfaction on the margin of the record of said mortgage, which the defendant has hitherto failed to do.

This suit is for the penalty prescribed by the statute for failing to enter satisfaction on the margin of the record of a mortgage, when it has been paid; also to compel defendant to bring in the note to Washington county before the court to be cancelled, so far as regards the rights of the defendant, Relfe, and for other and general relief.

These are the facts substantially as found by the court, and upon these facts, the Circuit Court refused to give the plaintiff any relief, and entered a decree for the defendant. The plaintiff thereupon prayed for an appeal, and brings the case here for further adjudication.

1. The statute concerning mortgages, (R. C. 1845,) which was the law in force at the time the request in this case was made to have satisfaction entered on the margin of the record, declares, in section 22 : "If any mortgagee, his executor or administrator or assignee receive full satisfaction of any mortgage, he shall, at the request of the person making the same, acknowledge satisfaction of the mortgage on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage." Sec. 23. "If any such person thus receiving satisfaction do not, within thirty days after request, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. upon the amount of the mortgage money absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction."

Sec. 24 declares the effect of such acknowledgment of satisfaction thus made, and of such deed of release acknowledged and recorded, to be, "to release the mortgage and bar all actions brought thereon, and reinvest in the mortgagor or his legal representatives all title to the mortgaged property."

How can the mortgage in this case be considered satisfied? Only by reason of the purchase by the mortgagee of the mortgaged premises, and this purchase can be considered a satisfaction of the mortgage, alone because it vests in the mortgagee the mortgaged property. Would it not be a strange proceeding to require a mortgagee, who is paid in this manner, to acknowledge satisfaction on the record and thereby restore the property received to the mortgagor? Such is the glaring absurdity of the case upon which this plaintiff seeks not only

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relief, but insists upon the imposition of a penalty upon another.

The principle is well established that the purchase by the mortgagee of the equity of redemption in the mortgaged premises extinguishes the mortgage debt, and the effect is the same, whether the purchase is by a direct contract with the mortgagor or at a sale of the land by execution under a junior judgment. (1 Bailey's Eq. Rep. 338. 2 Cow. Rep. 300.) In this case, however, the court is not to be understood as expressing the opinion that the matters set up and found as above, constitute any payment of the mortgage, as against Relfe. It is enough to say, if they did, that would be the very reason why the plaintiff should not have the relief he seeks.

The judgment is affirmed; the other judges concurring.

CHOUTEAU'S EXECUTOR & OTHERS, Appellants, vs. BURLANDO
& OTHERS, Respondents.

1. D. was originally the owner of 10,256 arpens of land, out of which he had conveyed 4000 arpens to his son, and afterwards mortgaged 4426 arpens described as his remaining interest in the tract. A sheriff's deed subsequently conveyed all his interest in the whole tract *except 4426 arpens* described as *sold by the sheriff at a previous term of the court*, of which previous sale there was no evidence in the record. *Held*, the sheriff's deed passed no interest in the 4426 arpens covered by the mortgage.
2. The omission of the officer taking the acknowledgment of a mortgage to certify to the personal identity of the grantor, can only be taken advantage of by a subsequent purchaser for a valuable consideration.
3. The lapse of thirty years held no bar to the foreclosure of a mortgage upon wild and unimproved land, where neither mortgagor nor mortgagee had been in possession, there being evidence that the mortgagor abandoned all claim to the land after executing the mortgage, and that the mortgage debts were unpaid. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations.
4. As by our statute the letters of an administrator are revoked by the fact of his becoming a non-resident, he cannot afterwards be made a party to a suit in his administrative capacity.

Appeal from Ste. Genevieve Circuit Court.

This was a petition filed in March, 1854, to foreclose a mortgage executed by Pascal Detchemendy to Pierre Chouteau and others in 1822, to secure various debts owing to the mortgagees in severalty. The mortgage is the same referred to in the case of *Moreau v. Detchemendy*, (18 Mo. Rep. 522.) The plaintiffs were the mortgagees or their personal representatives, and the defendants were the administrator and heirs of Pascal Detchemendy, the claimants of the land, and a portion of the mortgagees or their representatives, who refused to join as plaintiffs. Upon the filing of the petition, it appearing that John L. Detchemendy, who had been the administrator, and was also an heir of Pascal Detchemendy, was a non-resident, an order of publication was made by the clerk in vacation, notifying him of the institution of the suit.

The claimants of the land answered that they were purchasers for a valuable consideration, without notice of a subsisting mortgage; and that the claims of the plaintiffs were barred because not presented for allowance against the estate of Pascal Detchemendy within the time prescribed by law, and also by the statute of limitations. The trial was by the court without a jury.

It appeared that Pascal Detchemendy, being the owner of three adjoining surveys of land on the river Establishment, containing about 10,256 arpens, by two deeds dated respectively July 20th and September 21st, 1821, conveyed to his son, Clement Detchemendy, 4000 arpens, to be so taken as to embrace certain mills and other improvements on the west end of the tract, reserving to himself a life estate in twenty arpens, including the house in which he lived. Subsequently, on the 27th of June, 1822, he executed the mortgage in question, in which the land conveyed was described as 4426 arpens which remained to him after the conveyances to his son. The certificate of acknowledgment to this mortgage did not state that the party executing the same was personally known to the offi-

cer. On the 16th of July, 1823, after a sale under an execution against Pascal Detchemendy, the sheriff executed to the purchaser a deed, which, after reciting that the execution had been levied upon "all the right, title, interest and property, which the said Pascal Detchemendy had in and to a certain tract of land known as the large survey of Pascal Detchemendy, said to contain 10,256 arpens (*except 4426 arpens sold at sheriff's sale at the last term of the Circuit Court of Ste. Genevieve,*) situated on the river Establishment," conveyed "all the right, title and property of him, the said Pascal Detchemendy, in and to the aforementioned premises." There was no evidence in the record of any previous sheriff's sale. All the title acquired by the sheriff's deed was conveyed to Clement Detchemendy on the 2d of February, 1827. Clement took possession of the mills in 1821, after the deeds from his father, and continued in possession until 1839, cutting wood on the whole tract, but up to 1835, claiming only 4000 arpens under the two deeds from his father, and his father's life estate in the twenty arpens under the sheriff's deed. In 1835, he acquired a tax title, after which he claimed the whole tract. The tax title consisted of two deeds, which described the land conveyed as "2602 acres of land, being part of 6002 58-100 acres, in township 37 and 38, of range 7, survey number 884 assessed in the name of Pascal Detchemendy, and originally claimed by Francis Moreau, and situate on Establishment; and 1361 12-100 acres of land, being survey number 2060, in township 37 of range 7, on Establishment, assessed in the name of Pascal Detchemendy under Francis Poilivre; and 1361 12-100 acres, being survey number 2059, in township 37 of range 7, on the Establishment, assessed in the name of Pascal Detchemendy and originally claimed by him." In 1836 and 1839, Clement Detchemendy conveyed all his interest in the entire tract to Joseph Boullier and Joseph T. Landry, whose title was afterwards acquired by the defendants, Dahmon, Maller and Burlando. The parties succeeding Clement Detchemendy had a possession of the same character as his.

Pascal Detchemendy continued to live in the house reserved in his deeds to his son until 1825, cutting wood over the whole tract, when he removed to Washington county, where he died in 1844. There was evidence in the record that he did not pay taxes on the land after executing the mortgage, and of declarations by him that he had given up the 4426 arpens to his creditors. The eastern end of the tract, supposed to be covered by the mortgage, was a pine forest, wholly unimproved, and was not sufficient to pay the mortgage debts. There was evidence tending to show that the debts had never been paid. Clement Detchemendy testified that his father was never able to pay them, and that some years after he removed to Washington county, he expressed dissatisfaction that the mortgagees did not proceed and sell the land under the mortgage. None of the mortgagees or those claiming under them were ever in possession of the land, or ever openly asserted any claim to it, although most of them resided in and near Ste. Genevieve county from the date of the execution of the mortgage. Clement Detchemendy stated that he had paid one of the debts secured by the mortgage since quitting possession of the land.

Upon the above facts, the Circuit Court declared that the plaintiffs could not maintain their suit.

G. E. Young, for appellant. I. The presumption of payment from lapse of time is not an absolute bar to the foreclosure of a mortgage, but may be rebutted by evidence. (2 Hilliard on Mort. 3 and 5. 10 Johns. Rep. 414. 3 Johns. Dig. 311. 7 Wend. 94. Cowper, 109.) II. The proof in this case repels any such presumption. 1. Because P. Detchemendy was insolvent and never able to pay. (Cowper, 109. 12 Vesey, jr., 266. 1 Bay, 482.) 2. There was not twenty years possession by the mortgagor or any one claiming under him. (Angel on Adverse Enjoyment, 62. 5 Wend. 295.) 3. There was payment of one of the mortgage debts within twenty years. 4. The mortgagor acknowledged the debts to subsist within twenty years. (2 Cox, 295.) 5. Because proceedings at law had been instituted by some of the creditors

within twenty years, as admitted in the answer. 6. Because the mortgaged premises were wild and unproductive lands, and not at any time heretofore of sufficient value to pay the debts. (10 Johns. Rep. 417.) 7. Because of the great number of creditors interested in this mortgage. (Hill on Trustees, 266.) III. There never has been any possession of the mortgaged premises, since Pascal Detchemendy left in 1825, by any one claiming under him or otherwise.

Rozier, Frissell, Nbell and Perryman, for respondents.

1. The mortgage set up by plaintiffs is barred by lapse of time. It is more than thirty years old, and unsupported by a single act of possession during all that time. (2 Hilliard on Mortgages, p. 7, §14, p. 10, §24. 5 Johns. Ch. Rep. 552. 4 Paige, 441.) 2. The facts in proof are not sufficient to rebut the presumption of payment arising from lapse of time. There was no proof of possession by the mortgagees, no payment of interest, and no recognition by the mortgagor of the existence of the mortgage within twenty years. 3. The mortgage, not being properly acknowledged, did not operate as constructive notice to purchasers, and therefore is not binding upon the respondents. 4. The general principle that the lapse of twenty years after a right of action accrues raises the presumption of payment applies as well to mortgages as all other sealed instruments, and that, without reference to any question of fact as to possession. Possession by the mortgagee must be shown affirmatively to rebut this presumption, and it does not devolve on the mortgagor to show an adverse possession.

SCOTT, Judge, delivered the opinion of the court.

1. The sheriff's deed under the judgment and execution of Menard did not embrace 4426 arpens of the grant to Pascal Detchemendy. This quantity was expressly excepted, and whatever may be the operation of that deed in other respects, yet, being the conveyance of a public officer, acting *in invitum* on the rights of others, by no rule of construction applicable to

the voluntary grants of private persons, can it be made to pass an interest which, by the very terms of the instrument, was not designed to be conveyed. This consideration disposes of the defence set up by the respondents, that they are purchasers for a valuable consideration without notice, as it appears that they have not and never had any other than the tax title to the land in controversy. If the defendants mean to rely on their tax titles, then they must be presented to the court in such a manner as that a satisfactory judgment can be pronounced upon their validity. As the record now stands, the deeds conveying those titles play no other part than to confuse and embarrass a record already sufficiently entangled and difficult to be unravelled. It does not appear whether or not those deeds cover the land in controversy.

2. It disposes, too, of the objection raised on the finding of the fact by the court that there was no declaration of a knowledge of the personal identity of the mortgagor by the officer taking the acknowledgment, as they, not being subsequent purchasers of the land mortgaged, cannot be affected by the omission.

3. The facts, as stated in the record, do not warrant the conclusion to which the court came in relation to the right of the plaintiffs to foreclose. Although a debt is barred by the statute of limitations, so that an action cannot be maintained to recover it, yet, if that debt is secured by a mortgage, its payment may be enforced, so long as the mortgage is available. (Angel on Lim. 77-8.) An important consideration is, that the land was wild and unimproved. The portion of the large grant on which the mortgagor resided, which, however, was no part of the mortgaged premises, was abandoned by the mortgagor a few years after the forfeiture of the mortgage, and he never returned to it. The mortgagor complained of the delay in foreclosing the mortgage. His own son testified to his inability to pay his debts. There was no possession by the mortgagor, in the sense that is required, in order to raise the presumption of satisfaction of the debts. Under the cir-

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cumstances, it is as fair to presume that the mortgagee was waiting for an enhancement of the value of the mortgaged premises, as they were insufficient to satisfy the debts, as to presume the satisfaction of the mortgage from the delay in bringing suit. Neither party was in possession. The land was wild and uncultivated. In such case, the most natural presumption would be, that things continued as they were at the beginning.

As Pascal Detchemendy died in the year 1844, we may suppose that the debts were all barred at that date, so that an action at law could not be maintained for their recovery. No inference, therefore, unfavorable to the mortgagees, can arise from their failure to present them to the administrator for allowance, even had there been assets in his hands sufficient to satisfy them.

After twenty years' possession by the mortgagee, the burden is on the mortgagor to show that such length of possession does not bar a right of redemption. The mere declarations and conversations of the mortgagee in possession, have not been received to destroy the presumption of payment arising from twenty years' possession. (Angel on Lim. 497.) But when declarations and conversations come in aid of the fact of abandonment of the mortgaged premises, which is open and notorious, there would seem to be no impropriety in receiving them.

So, on the other hand, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing and the like. (*Hughes v. Edwards.*) In the absence of all possession by the mortgagor or the mortgagees, it is obvious that these principles have nothing to do with the case under consideration.

4. It is strange that an order of publication should have been made against John L. Detchemendy, as non-resident adminis-

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trator. The 58th section of the 1st article of the act concerning administration, enacts that letters of administration, in no case, shall be granted to a non-resident, and when an executor or administrator shall become non-resident, his letters shall be revoked. If the administrator, as such, was a necessary party to the suit, the proper course to be pursued was, to have the first letters revoked and another administrator appointed. The administrator not having been properly a party before the court, no judgment affecting the estate of which he was administrator, can be rendered against him for costs or any other thing.

The judgment will be reversed, and if there is any thing in the tax titles of the defendants, they can in a future trial be presented in an intelligible way. The other judges concur.

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• THE STATE, Plaintiff in Error, *vs.* SEARCY, Defendant in Error.

1. The law prohibiting the sale of liquor (R. C. 1845,) without a license is constitutional.

Error to Monroe Circuit Court.

The case is stated in the opinion. Written arguments on behalf of the state were filed by Mr. Carr and Mr. Clover. There was no appearance for the defendant.

RYLAND, Judge, delivered the opinion of the court.

At the June term, 1854, of the Circuit Court within and for Monroe county, the grand jury indicted the defendant, Searcy, for selling intoxicating liquors in quantities less than one quart, without a license. This indictment was found upon a violation of the act of 1845, entitled "An act to regulate groceries and dram-shops," approved March 25, 1845.

The defendant appeared and moved the court to quash the indictment, assigning for reason, that the first and third sec-

tions of the said act were repugnant to the constitution of the state. This motion was sustained, and the defendant discharged. The State duly excepted to the decision of the court, and brings the case here by writ of error.

The only question before us is that involving the constitutionality of this statute. The first and third sections are as follows: Sec. 1. "No person shall directly or indirectly sell intoxicating liquors without taking out a license as a grocer or dram-shop keeper."

Sec. 3. "No grocer shall, directly or indirectly, sell intoxicating liquors in any quantity less than a quart, nor shall he permit any intoxicating liquors sold by him to be drank at his grocery, or at any place under his control."

Sec. 4. "A dram-shop keeper is a person permitted by law, being licensed according to the provisions of this act, to sell intoxicating liquors in any quantity less than a quart." This last section has been repealed by an act passed in 1849, approved March 12, by which last act a dram-shop keeper is permitted to sell intoxicating liquors in any quantity less than ten gallons at any one time.

The nineteenth section of the act of 1845 fixes the penalty for a violation of the provisions of the act at not less than twenty nor more than one hundred dollars.

There is no provision of the constitution of the state of Missouri which denies to the legislature the power of enacting this statute. This statute is nothing more than an assertion in part of what is called or known familiarly as the police power of a state; a power to preserve the peace, promote good morals, restrain vice, and protect the property and health of the people. That the several state governments have exercised these and kindred powers to the very amplest extent, from the earliest period of their existence, is matter of history.

A similar statute in New York has been held not to conflict with the constitution of the United States. (See *Ingersoll v. Skinner et al.*, 1 Denio, 540.)

In the case of the *Commonwealth v. Kimball*, (24 Pick.

359,) the Supreme Court of Massachusetts held that the statute requiring a person to be first licensed as a retailer of spirits, before he could presume to sell in a less quantity than twenty-eight gallons, was not repugnant to the constitution of the United States. Chief Justice Shaw says, in delivering the opinion of the court in this case: "The power to pass laws for regulating licensed houses, as one of the powers of general police, is clearly vested in the state, and is as clearly not vested in the general government. But in carrying into effect a law flowing from one of the acknowledged powers of a state, they may resort to means, which, in their operation, would oppose or impede a law of the United States, made in pursuance of its acknowledged powers. In such case, the law of the state must yield, so far as it can have this effect. But such conflict is not to be presumed, but, on the contrary, it must be clearly shown and established. In the present case, it is not shown, nor can we presume that the law regulating the sale of spirituous liquors by retail, and confining the power to sell in that form to those who shall first have obtained the recommendation of the proper officers for that employment, will frustrate, defeat or impede any law of the United States."

The *State v. Muse*, (3 Dev. & Bat. 319 :) A statute of North Carolina, prohibiting the sale of spirituous liquors and other articles, except by licensed stores and taverns, near a church or meeting house, or other place of divine worship, was, by the Supreme Court of that state, held to be constitutional.

License cases, 5 How. Sup. Ct. U. S. Rep. 504: The liquor laws of Massachusetts, New Hampshire and Rhode Island declared constitutional. The design of these laws was manifestly to prevent tippling and disorder by promoting temperance and sobriety; obviously a part of the system of internal police of every well regulated government.

The Supreme Court of Alabama held that a power granted to the corporation of the city of Mobile "to license bakers and regulate the weight and price of bread, and prohibit the baking for sale," except by those licensed, is not contrary to the

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constitution of the state. (See *Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. 137.) The Supreme Court of Tennessee held that the legislature had the power, under their state constitution, to prohibit, in general, the keeping of stallions and jacks for purposes of profit in the propagation of stock ; and also to prohibit, in general, the exhibition of shows, and yet concede these privileges to all those who shall apply for a license and pay for the privilege the amount specified by law. (*Mabry et al., v. Tarver*, 1 Humph. 94. 12 Conn. 7. 8 Ohio, 521. 3 Smedes & Marsh. 584. 7 How. Sup. Ct. U. S. Rep. 283, Passenger cases. R. M. Carlton's Rep. 26.) And it is believed, when such powers are denied to the legislative departments of the states, there will be but little left for which their continued existence is at all important.

Questions have sometimes arisen in the courts as to whether a state statute had not been so framed as to constitute a regulation of commerce, in the sense in which that subject has been placed under the control and power of congress ; or so as to impose a duty on imports or exports, contrary to the provisions of the constitution of the United States. In the case of *Crow v. State of Missouri*, (14 Mo. Rep. 237,) the question was made at the bar, and discussed by the judges, whether a tax on an occupation, graduated by the amount of property on hand, might not be considered as a tax on the property itself, and if so, whether it should not stand affected by the provision in our constitution which requires the taxation of property to be in proportion to the value.

No such question arises here, and whatever may have been the conflict of opinion that has sprung up in our judicial tribunals, when other subjects have been brought into the scope of the controversy, there seems to be no room to doubt that the statute now under consideration would be promptly upheld by the supreme courts of every state in the Union.

That such a statute is not unconstitutional, has been already adjudged, in the following cases decided by this court : *Austin v. The State*, 10 Mo. Rep. 591. *State v. Lemp*, 16 Mo.

Ex Parte Mallinkrodt.

Rep. 389. *City of Hannibal v. Guyott*, 18 Mo. Rep. 515. The Circuit Court therefore erred in sustaining the motion to quash the indictment. Its judgment is reversed and the cause remanded for further proceedings; the other judges concurring.

EX PARTE MALLINKRODT.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*.

Habeas Corpus. From the jailor's return to a writ issued by this court, it appeared that the petitioner was in custody under a *mittimus* issued by a notary public of St. Louis county, for an alleged contempt in not producing certain books and papers in obedience to a *subpœna duces tecum* issued by the notary, before whom he had been summoned to give his deposition as a witness on behalf of the plaintiffs in a certain cause pending in the St. Louis Circuit Court. The *mittimus* set forth that the petitioner admitted having the books and papers in his possession when the *subpœna* was served upon him, and that he had since delivered them to one of the defendants, to avoid the necessity of producing them at the taking of his deposition, whereupon the notary committed him to jail, there to remain until he should produce them, their materiality being made to appear by the affidavit of the agent of the plaintiffs.

Kribben and Henning, for the petitioner.

SCOTT, Judge. The act of 13th February, 1847, empowered notaries to take depositions under the act concerning "Depositions," approved January 17, 1845. The fifteenth section of the act referred to authorized the officer empowered to take depositions, to compel the attendance of witnesses, in the same manner and under the like penalties as any court of record of this state.

The eighth section of the act concerning witnesses provides

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that any person summoned as a witness and attending, who shall refuse to give evidence, which may lawfully be required to be given by such person, may be committed to prison by the person authorized to take his deposition.

The power of notaries, in taking depositions, is strictly statutory. They can do nothing not expressly authorized and under the circumstances which authorize it. There is no power given to an officer taking depositions to commit a witness for refusing to produce books. Powers in derogation of the liberty of the citizen must be strictly construed.

Let the prisoner be discharged, the other judges concurring.

EDGEELL, Respondent, vs. SIGERSON, Appellant.

1. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud.
2. A judgment obtained by fraud is void.

Appeal from St. Louis Court of Common Pleas.

This was an action commenced in January, 1854, upon a note dated October 1, 1848, expressed on its face to bear interest from date, payable annually. The petition stated that the plaintiff, in 1852, had commenced a suit against the defendant to recover the instalments of interest then due, in which the defendant had pleaded that the clause in the note specifying that interest was payable annually had been inserted after its execution without his knowledge, authority or consent, and that the plaintiff had recovered a judgment in that suit. This allegation in the petition seems to have been intended to estop the defendant from setting up the same matter as a defence in the present suit.

The defendant answered, alleging that after he had executed the note, and after it had passed from his possession, the words "with interest from date at six per cent. per annum,

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interest payable annually," were fraudulently inserted in the note by the then holder, without his knowledge or consent, and that it was subsequently transferred and delivered to the plaintiff; and insisting that said fraudulent alteration rendered the note void. He admitted the recovery of a judgment in a suit for interest, as stated in the petition, but alleged that "said judgment was obtained by fraud and by perjury committed on the trial of the issues in the cause," and was therefore null and void.

This answer was stricken out on motion, and a judgment rendered for the plaintiff, from which the defendant appealed.

Krum & Harding and *A. M. Gardner*, for appellant. Fraud in the recovery of the judgment is distinctly alleged in the answer. If this were true, the judgment would constitute no bar to the defence set up. (1 New Hamp. Rep. 257. 15 Johns. Rep. 121:.) This defence was well pleaded. (See *v. Cox*, 16 Mo. Rep. 166.)

Shepley and *Kasson*, for respondent, among other points, insisted that, under the new practice, one object of which was to prevent delay and fictitious defences, the judgment which would estop the plaintiff from setting up an anticipated defence was properly pleaded in the petition, and that the allegation of the answer that the judgment was obtained by fraud and perjury, without stating who was guilty of the fraud or in what it consisted, was not sufficient to avoid the effect of the judgment, being a conclusion of law and not a statement of facts. (*McMurray & Thomas v. Gifford*, 5 Howard's Prac. Rep. 14.)

LEONARD, Judge, delivered the opinion of the court.

1. This judgment must be reversed for the error of the court in pronouncing against the defendant as for want of an answer.

Without stopping to settle the propriety (which is certainly very questionable) of the mode of pleading adopted by the plaintiff on the present occasion, in order to avail himself of the alleged estoppel by reason of the judgment, it is enough that the answer contains sufficient matter to avoid the estoppel.

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In disregarding the answer, the court below appears to have gone upon the idea that, under the new system of pleading, the alleged fraud set up as a ground of nullity in the judgment was not well pleaded, on the score of its being a statement, not of the facts constituting the fraud, but of the conclusion of law upon the facts.

Under the former system, it was sufficient to state this matter in this general form. Fraud usually consisting of a great multiplicity of facts and circumstances, it was found by experience highly inconvenient, if not quite impracticable, to set them forth with particularity, and hence this general mode of stating such matter of defence forced itself into use, and was approved of by the courts. (*Montgomery v. Tipton*, 1 Mo. Rep. 318. *Pemberton v. Staples*, 6 Mo. Rep. 59. *Hill v. Montague*, 2 Maule & Selwyn, 377.) And we see no reason for holding otherwise under the new code, (although we are aware of a decision to that effect in New York, under a similar system. | (*McMurray & Thomas v. Gifford*, 5 How. Prac. Rep. 14.) The common law definition of a pleading is, "the statement, in a logical and legal form, of the *facts* which constitute the plaintiff's cause of action or the defendant's ground of defence, (1 Chit. Plead. 244,) which is the very language, so far as the present question is concerned, used by our code in defining a complaint and answer. Facts, and facts only, are to be stated. The pleader must not descend into a mere detail of the evidence, nor stop short at general conclusions of law, but must set down the issuable facts, and them only. This is the language of both systems; but it must be understood according to the necessities of the case to which it is applied. No system, it is believed, was ever yet put in practice in which the ultimate facts, as they actually took place, constituting the cause of action or ground of defence, were, in all cases, without exception, required to be set forth. It would be utterly impracticable to do so. Indeed, perhaps the greater portion of the matters stated in pleadings are the legal results of what actually occurred, rather than the occurrences themselves, as they

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transpired, and this is so much the case, that it has been said, these ultimate results are the true issuable facts, and constitute the only proper objects of averment in pleading. /

Of course we do not mean to say that general pleading is admissible now, in like manner and to the same extent that it was under the old law; but only that there are cases now, as formerly, where it is practically impossible, owing to the multiplicity and minuteness of the facts and circumstances constituting the particular matter or point relied upon, to go further than to state the result, as the issuable facts in the pleading, and that the present case is one of that character.

2. If the judgment here relied on as an estoppel were obtained by fraud, it was void. (*Farmer's case*, 3 Coke's Rep. 77. *State v. Little*, 1 New Hamp. Rep. 257.) And as the answer insisted upon the invalidity of the note, on the ground of the alleged alteration, and avoided the estoppel by the alleged fraud, it contained a defence to the action, and ought not to have been treated as a nullity.

We express no opinion as to the proper mode of treating an answer which is so indefinite as not to indicate, with sufficient precision, the particular defence intended to be relied upon, but only declare that this answer is sufficient in that particular, and therefore ought not to have been treated as a nullity.

Judge Ryland concurring, the judgment is reversed and the cause remanded.

ALMEIDA, Appellant, vs. SIGERSON, Respondent.

1. A party sued before a justice filed as an off-set an account exceeding the justice's jurisdiction, but attempted to be brought within it by a credit for the amount of the plaintiff's demand. *Held*, this could not be allowed as a set-off.

Appeal from St. Louis Law Commissioner's Court.

This action was commenced before a justice on an account for forty-seven dollars and thirty cents. The defendant filed

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as an off-set a demand against the plaintiff for one hundred and thirty-seven dollars, upon which there was a credit for the amount of the plaintiff's demand, leaving a balance due of eighty-nine dollars and seventy cents, for which amount the defendant had judgment in the commissioner's court. The plaintiff filed a motion in arrest, which was overruled, and he appealed.

S. Reber, for appellant.

A. M. Gardner, for respondent.

LEONARD, Judge, delivered the opinion of the court.

The defendant's set-off is founded on an account for \$137, which he credits with \$47 30, (the amount of the plaintiff's account sued upon,) leaving a balance of \$89 70, for which he asked and obtained judgment.

The objection is, that the amount claimed in the set-off exceeds a justice's jurisdiction, which is the same in set-off as in an original suit, and therefore limited, in a case like the present, to a balance of not exceeding ninety dollars.

Although apparently within the words of the statute, the party is in effect suing in set-off for the whole sum, (\$137,) and asking that \$47 30 of it may be applied in extinguishment of the plaintiff's debt, and for a judgment for the whole amount claimed in his plea, as the balance; and it is not, in truth, a cross action by way of set-off for a mere balance of \$89 70. If the defence were pleaded in the words of a formal plea of set-off, this would appear plainly enough, as the prayer of the plea would be that so much of the balance (\$89 70) now claimed, as should be necessary for that purpose, might be applied in extinguishment of whatever sum should be found due the plaintiff, and for a judgment for the residue, which, according to the words of the plea, would be what remained after a second deduction of the plaintiff's demand.

It is an ingenious enough attempt to evade the statute, but it cannot be allowed to prevail.

The judgment is reversed, and the cause remanded.

State, at the relation of Bates, v. St. Louis County Court.

THE STATE, AT THE RELATION OF BATES, vs. THE ST. LOUIS
COUNTY COURT.

1. The provision, in the act establishing the St. Louis Land Court approved February 23, 1853, that the judge should receive the same compensation as the judge of the St. Louis Court of Common Pleas then received means, not only that he should receive the *same amount*, but from the *same sources*.

Edward Bates, Judge of the St. Louis Land Court, presented his petition for a writ of *mandamus* to the St. Louis county court, requiring the latter to allow and pay to him out of the county treasury such an amount as, together with two hundred and fifty dollars received from the state treasury and forty-one dollars received on account of judgment fees, would make up his quarter's salary of seven hundred and fifty dollars; or show good cause to the contrary. In answer to the writ, the county court appeared by attorney, and as cause for the refusal to pay, alleged that there was no law of the state by which that court was authorized or required to pay or cause to be paid any portion of the salary of the judge of the Land Court.

C. Gibson appeared for the relator.

A. Todd, for the county court, insisted that the judge of the Land Court was a state officer, and of course to be paid out of the state treasury, it not being otherwise expressly provided.

Scott, Judge, delivered the opinion of the court.

By an act of the general assembly passed 23d February, 1853, a Land Court was established for St. Louis county. This court was required to be held by a judge elected by the qualified voters of St. Louis county. Edward Bates, the plaintiff, was elected to that office, and after being qualified, he entered upon the discharge of his duties. He has received a salary as judge, up to this time, the same in amount and payable in the same manner as the judge of the St. Louis Court of Common Pleas, the statute creating the Land Court enacting that the judge thereof shall receive the same compensation as th

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Judge of the St. Louis Court of Common Pleas. The judge of the Court of Common Pleas received at the date of the act referred to, as a salary, first, an annual sum of one thousand dollars, payable quarterly out of the state treasury; secondly, certain fees provided by the statute and taxed upon final judgments rendered in said court; and thirdly, an additional amount payable out of the county treasury, the whole compensation not to exceed three thousand dollars.

On the 5th of March, 1855, an act was passed directing that the judges of the St. Louis Circuit Court, the St. Louis Court of Common Pleas, and the St. Louis Criminal Court shall be each paid a salary of two thousand dollars out of the state treasury. Since the passage of this act, the county court of St. Louis county refuses to pay any portion of the salary of the judge of the Land Court, maintaining that the whole of his salary is of right payable out of the state treasury. For the purpose of determining this question, this writ of *mandamus* has been awarded, and the facts stated in the petition admitted by the county court.

1. It was contended on the part of the defendant that the judge of the Land Court is a state officer, and as such entitled to receive his salary from the state treasury as all other state officers; that the act of the legislature creating the Land Court, in enacting that the judge thereof should receive the same compensation as the judge of the St. Louis Court of Common Pleas, intended merely to fix the amount of the compensation, leaving the payment thereof to be made, as the salaries of all other state officers, out of the common treasury.

There is one difficulty attending this view of the subject not easily to be overcome. Salaries are not of right payable quarterly. If an annual salary is given to an officer regularly, that salary is not payable until a year's service is rendered. An express enactment is necessary to make it payable quarterly. If, in enacting that the judge of the Land Court should receive the same compensation as the judge of the St. Louis Court of Common Pleas, nothing more was intended by the

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general assembly than to fix the amount of the salary, then there would be no direction as to the manner of payment in point of time, and it could be drawn but once a year. Now we cannot suppose that the law designed to make the judge of the Land Court an exception to all the other officers of the state, and pay him his salary at the end of each year, instead of paying it quarterly as all other salaries are paid. This omission then would seem to imply that something more was intended by the reference to the salary of the judge of the Court of Common Pleas. If the mode of payment, as to time, was contemplated, what is to prevent us also from looking into the sources of the payment? But is a salary payable quarterly out of the state treasury the same as one of like amount payable out of the county treasuries of all the counties in the state? Would an officer hesitate in making his choice between these salaries? Is not one preferable to the other? How then can we say that they are the same? Is a salary payable quarterly the same as one for the like amount payable annually?

But if we regard the policy of the state as indicated by her legislation, it would be apparent that the general assembly never intended that the whole of this salary should be paid out of the state treasury. With the wisdom or liberality of this policy, we have nothing to do. Our province is, to administer the law in the spirit in which it is made. There are other judges in the state performing duties similar to those performed by the judges of St. Louis county. The legislature has evinced the intention to make the salaries of all the judges throughout the entire state of the same class, the same in amount, as far as they were payable out of the state treasury. It has been unwilling to create dissatisfaction among some of the judges, and furnish them with a pretext for asking an increased compensation, by enlarging the salaries of the judges in any portion of the state out of the common funds. If an increase has been made in a salary, it has been at the expense of the county in which the court existed. The judges of the St. Louis courts, however urgent the reasons were, had been enabled to obtain an increase

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of their salaries, only throwing the burden of the increase on the suitors in her courts and her county treasury. This was the policy of the state at the time of creating the Land Court in St. Louis county. Now when we consider that this Land Court was established in St. Louis county, when, by the settled policy of the state, none of her judges were permitted to receive but a portion of their salaries from the common treasury, we are driven to the conclusion that the legislature, when it enacted that the judge of the Land Court should receive the same compensation as the judge of the St. Louis Court of Common Pleas (a court established for St. Louis, and a portion of whose salary only was payable out of the state treasury,) intended not only that the salary should be the same in amount, but the same in all respects.

Although the office of judge of the St. Louis Land Court is an honorable and responsible one, yet there is nothing in its organization or the nature of the powers with which it is entrusted, that would necessarily warrant a difference, as to the mode of its compensation, between it and the other courts established in St. Louis county. There is no doubt if an office is created by law, and the salary of that office is fixed, and nothing declared as to the mode of its payment, that of right it would be payable out of the common treasury. But the case supposed is not this case. We consider that the mode of payment is designated in the act creating the Land Court, by the reference to the compensation of the judge of the St. Louis Court of Common Pleas, a court like the Land Court, that was established for St. Louis county, whose judge, by the policy of the state, was not permitted to receive but a portion of his salary out of the state treasury; and because there is nothing about the Land Court which should, in this respect, distinguish it from all the courts established in St. Louis county, the salaries of whose judges are only in part paid out of the common funds of the state. The other judges concurring, a peremptory *mandamus* will be awarded.

BROOKS, Appellant, vs. WIMER *et al.*, Respondents.

1. Under the first section of the act concerning "fraudulent conveyances," (R. C. 1845,) a deed of a stock of goods to a trustee, for the benefit of creditors, which, on its face, reserves to the grantor the right to continue to sell the goods in the usual course of his business until default made in the payment of the debts intended to be secured, is, as a matter of law, void against existing and subsequent creditors and purchasers.

Appeal from St. Louis Court of Common Pleas.

This was an action commenced August 27, 1853, by Brooks, to recover in the form of damages the value of a stock of goods seized and sold by the defendant, Wimer, as sheriff of St. Louis county, under executions in favor of the other defendants against William W. Price, dated respectively June 16th, and July 14th, 1853. The plaintiff claimed the goods under a deed from William W. Price to him as trustee, for the benefit of certain creditors of Price, dated March 5th, acknowledged March 15th, and recorded March 30th, 1853. This deed was set out at large in the petition and made part of it.

The deed, after reciting that Price had already obtained from certain enumerated creditors an extension of time upon their demands against him, for which, in pursuance of the extension, he had executed various notes, the earliest of which was payable six months from February 10th, 1853, and that he expected to obtain a like extension from other creditors, to-wit: Carter & Rees, Campbell, Chess & Co., and Marshall & Brother, proceeded as follows: "Now therefore, in consideration of the premises, and of the sum of one dollar to him in hand paid by Edward Brooks, of the city of St. Louis, receipt whereof is hereby acknowledged, and to carry out the agreements and purposes above specified, the said Price does hereby sell, transfer and convey to the said Brooks the entire stock of hardware, goods, wares and merchandise now on hand in the store occupied by said Price on Main street in said city, or wherever else the same may be, and also all the hardware, goods and merchandise, which the said Price may purchase or acquire in the course

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of, or for the purpose of carrying on his said hardware and commission business, during the time embraced within the period of said extension. *To have and to hold* the same to the said Brooks, his executors and administrators, in trust for the purposes herein stated, and with the following restrictions and conditions, viz: If the notes above mentioned, given by said Price in pursuance of the terms of said extension, and the other sums agreed by him to be paid, as above stated, under the terms of the extension already agreed upon, be paid when they become due, as above mentioned; and in case the said Carter & Rees, Campbell, Chess & Co., and Marshall & Brother, or any of them, do assent, then also if the said sums that will be payable to those who do so assent be also paid agreeably to the terms of the said extension, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of said Price; but if said notes or any one of them agreed to be paid under the terms of said extension already assented to, as above stated, or said sums or any one of them that will be payable if an extension be assented to by said Carter & Rees, Campbell, Chess & Co., Marshall & Brother, or either of them, shall not be paid when the same shall be due, as above stated, then this deed shall remain in full force; and the said Brooks may then take possession of said hardware, goods, wares and merchandise, and proceed to sell the same, as he may in his judgment deem best for the interest of all concerned, and receive the proceeds of such sale, out of which he shall pay first the costs and expenses of this trust, next, the full amount that shall remain unpaid of said notes and each of them above mentioned, and of said other sums agreed or that may be agreed to be paid under the terms of the extension above mentioned, whether the time above named for the payment of said notes or other sums shall have arrived or not; and if there be not sufficient to pay all said notes and other sums remaining unpaid, then the same are to be paid *pro rata*. And if there be any balance, after paying all, the same shall be paid to the said Price, his executors, administrators or assigns. *And it is*

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further expressly provided that, until default shall be made by the said Price in the payment of some of said notes or sums above mentioned, the property hereby conveyed or intended to be conveyed, or any part thereof, shall not be taken possession of or interfered with by the said Brooks, but the said Price may, until such default, continue to sell and dispose of the same in the regular or usual course of said business."

A demurrer to the plaintiff's petition was sustained by the Court of Common Pleas, and he appealed to this court; and the question presented was, whether he acquired any title by the deed which would enable him to sustain this action.

Glover & Richardson (with *Comfort & Manter*,) for appellant. There is nothing on the face of the deed that determines, in point of law, the same to be fraudulent as to the creditors of Price. The possession of the goods remaining with the grantor did not render the deed invalid, because it was duly acknowledged and recorded. (Act concerning Fraudulent Conveyances, R. C. 1845, p. 527, §8.) The tenth section of that act only applies to absolute sales; but if it embraced the case at bar, was not conclusive on plaintiff's title. (15 Mo. Rep. 416.) The consideration of the deed was proved by its own recitals. (19 Mo. Rep. 17, overruling 5 Mo. Rep. 484.) This case has been erroneously likened to that in 6 Mo. Rep. 302 and 317. This deed requires no release. It prefers those who may grant an extension, but the advantage is given to the creditor. The right to prefer enabled the grantor to cut off absolutely those who had not agreed to the extension, but he did less. Here, the whole fund would not pay the preferred debts. (16 Mo. Rep. 594.) The power to sell in the course of business did not render the deed void. (11 Mo. Rep. 373.) All the debts of the grantor, after paying those preferred, are to be paid *pro rata*; and so it is only the surplus then left which is to go to the grantor. It is fraud in fact, intentional fraud, and not fraud such as the law implies or infers from facts, that avoids a deed under the act concerning "assignments," (R. C. 1845,

p. 127.) There must not only be a fraudulent purpose in the mind of the grantor, but the grantees must also be convicted of the same fraudulent motive. (19 Mo. Rep. 27.)

Hart & Jecko, for respondents. I. The deed gave Brooks no right to the possession of the goods until default made in the payment of some one of the notes, and as none of the notes had become due when this suit was commenced, he had no right of action. II. The deed was fraudulent on its very face, because, 1. It contains a provision which cuts off from its benefits all those who do not assent to an extension of time. 2. It provides that the grantor shall remain in possession until default. 3. It provides that the grantor shall continue to *sell and dispose of the goods*, and of course pocket the proceeds, there being no express provision that he should account for them. 4. It provides that the surplus, *after paying those who agree to an extension*, shall be paid to the grantor.

Upon the whole subject, the following authorities were cited: (Burrill on Assignments, 401. 2 Tucker's Comm. 432. 11 Wend. 187. 7 Paige, 272, 568. 6 Hill, 438. 4 Comstock, 580. *Goodrich v. Downs*, 6 Hill, 438. *Simpson v. Mitchell*, 8 Yerg. 417. *Jordan v. Turner*, 3 Blackford, 309.)

SCOTT, Judge, delivered the opinion of the court.

The deed in this case comes within the first section of the act concerning fraudulent conveyances. That section enacts that every deed of gift and conveyance of goods and chattels, in trust to the use of the person so making such deed of gift or conveyance, shall be void as against creditors, existing and subsequent, and purchasers. In the case of *Robertson's Ex'r v. Robards*, (15 Mo. 459,) this court held that, if a conveyance on the face of it appears to be for the use of the person making it, as a matter of law the court will declare it void against creditors, just as it would declare a bond conditioned to murder a man or to do any other unlawful act. There is no fact here to be found by a jury. On the very face of the instrument by which a party intends to convey his goods for the benefit of his credi-

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tors, there is a reservation to himself of the right of disposing of them, without any accountability to any one for the proceeds of the sale. Thus, under this pretended assignment for the benefit of his creditors, the grantor disposes of all the assigned property for his own use. This, then, is a deed in trust to the use of the person making it, and under the authority of the first section of the act concerning fraudulent conveyances, the court, as a matter of law, upon its very face, was warranted in pronouncing it void.

The assignment in the case of *Milburn v. Waugh & Corthran*, (11 Mo. Rep. 369,) did not reserve to the grantor the right of disposing of the goods conveyed in trust.

We do not regard the views expressed in relation to this case as at all conflicting with the former doctrine of this court, that fraud is a question of fact for a jury, except in those cases in which, from the very face of the instrument, the conveyance is void under the statute. In cases where the terms of a conveyance are by possibility consistent with good faith, and it has upon it the elements of a legal instrument, the question of fraudulent intent and want of good faith in making it, must be submitted to the jury. In such case, he who assails the instrument on the ground of fraud will submit to the jury all the evidences of bad faith arising from the form of the conveyance or its stipulations in favor of the grantor which serve to create a presumption of fraud. But this evidence will be open to explanation, and may be shown to consist with good faith in the parties.

The other judges concurring, the judgment will be affirmed.

PAGE & BACON, Plaintiffs in Error, vs. GARDNER, Defendant
in Error.

1. Neither an original general assignee nor one substituted by the appointment of the court, under the statute, (R. C. 1845,) in possession of chattels claimed under the assignment, will be protected from suit by a party claiming the same chattels under a conveyance from the assignor previous to the assignment, on the ground of being an officer or quasi officer of court.

2. A general conveyance of all debts that "may be due" to the grantor, at a specified subsequent date, without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts (or the money collected upon them) contracted, though not due at the date of the conveyance.

Error to St. Louis Court of Common Pleas.

This action was brought by Page & Bacon, to recover money in the hands of the defendant, Gardner, as general assignee under the statute, (R. C. 1845,) of George K. Budd, collected on accounts claimed by the plaintiffs, as purchasers under a deed of trust executed by Budd previous to the assignment, and to recover possession of uncollected accounts claimed by them in like manner.

On the 27th of September, 1852, Budd, by deed recorded December 17, 1852, conveyed to Kellogg, in trust to secure a note for \$5000, payable to plaintiffs on the first of January, 1853, "all his right, title and interest in a newspaper called the St. Louis Intelligencer, together with the type, presses, paper and fixtures contained in the Intelligencer building, (describing them;) also all assets which may be due the said Intelligencer newspaper, the good will of said paper, and the subscription list of the same at the date of the maturity of the note." In case of the non-payment of the note at its maturity, the trustee was authorized to sell the property conveyed, upon twenty days' notice, at public auction, to the highest bidder, and execute a bill of sale to the purchaser. No schedule of the debts owing to the Intelligencer establishment accompanied this deed. The note not being paid, the trustee sold the property pursuant to the terms of the deed of trust, and executed to the plaintiffs, who became the purchasers, a bill of sale dated October 4, 1853, conveying the property by the same description contained in the deed of trust.

On the 19th of February, 1853, Budd executed to J. G. McClellan a deed of assignment for the benefit of his creditors, conveying "all notes, bonds, bills, book accounts, dues, demands or evidences of debt whatsoever," due or to become due

on any contract made before January 1st, 1853, growing out of the business of the St. Louis Intelligencer. This deed was accompanied by a schedule. McClellan took possession at once, and gave bond in compliance with the provisions of the statute regulating assignments, (R. C. 1845.) By order of the St. Louis Circuit Court, the defendant, Gardner, was subsequently substituted for McClellan, as assignee, and gave bond pursuant to the statute. When this suit was brought, the defendant was in possession of the book accounts of the Intelligencer establishment, and had collected \$1500 on accounts due on the 1st of January, 1853. A portion of the accounts sued for accrued prior to September 27th, 1852, the date of the deed of trust, and a portion subsequent to that date. The plaintiffs made a demand upon the defendant for the money and accounts claimed by them, before suit was brought.

The Court of Common Pleas found facts substantially as above stated, and that the defendant was in possession of the money and accounts sued for, "under the order and appointment of the Circuit Court," and had never been discharged by that court; and upon these facts, declared that the plaintiffs could not recover, whereupon they sued out this writ of error.

Knox & Kellogg, for plaintiffs in error. 1. By the bill of sale from Kellogg, the appellants acquired a perfect right and title to all the property, accounts and money in the hands of the respondent as assignee of George K. Budd. The cases which decide that a deed does not pass after acquired property are not applicable. Here, the debts accruing subsequent to the date of the deed of trust to Kellogg arose from the natural and ordinary use of the property and materials conveyed by that deed, and not from subsequent purchases. Besides, the finding shows that some of the money in the hands of the respondent was collected on accounts due and owing *at the date of the deed to Kellogg*. 2. The decision of the court below was based upon the idea that the respondent was not personally liable, because acting under the appointment of the Circuit Court, and that the appellants could only obtain their rights by an or-

of the Circuit Court—an idea erroneously supposed to be sanctioned in the case of *Gates v. Labeaume*, (19 Mo. Rep. 17.)

J. A. Kasson, for defendant in error. 1. Under the statute regulating assignments, (R. C. 1845,) the Circuit Court has the entire control of both assignee and assets. The property is in the custody of the court, the assignee being in fact but the agent of the court. Any claim against the fund, or the assignee on account of the fund, must be made in the court having both in charge. These assets were ordered by the court to be put into defendant's hands, he having been appointed for that purpose by the court. To allow him to be drawn into divers courts by conflicting claims, incurring expenses in each, as a defendant in his own right, would operate as a great hardship upon him, and involve him in his relation to his own court and creditors provided for by his deed. (*Curling v. Hyde*, 10 Mo. Rep. 375. *Brooks v. Cook*, 8 Mass. 274.) No officer under the immediate control and direction of a court, and having funds by its order, can be reached except through his own court. 2. As against a subsequent purchaser, nothing passed to plaintiffs' trustee, or from him to plaintiffs at the sale, so far as *choses in action* were concerned, because the deed was so far null and inefficient for uncertainty. There was no schedule of names of debtors, dates or amounts of indebtedness. There was nothing to identify the accounts or notes so alleged to be transferred. They could not be legally transferred in that way. A legal transfer for a valuable consideration, (19 Mo. Rep. 26,) prior to the sale to plaintiffs, had already been made; and plaintiffs have no lien which they can pursue in this action against Gardner. From such an indefinite deed as that to Page & Bacon's trustee, no notice is presumable to Gardner, as touching these proceeds. 3. No debts which accrued after its execution could pass by virtue of the prior-executed deed of trust. (4 Metcalf, 306. 13 Metcalf, 32.)

RYLAND, Judge, delivered the opinion of the court.

1. It is contended by the counsel for the respondent, Gardner, in this case, and is, indeed, the chief ground of his de-

fence to the plaintiff's action, that Gardner, the assignee, holding the property as an officer of the law, is not responsible in his individual capacity to an action for the effects in his hands as assignee; but that a proceeding must be instituted, in the court having authority over this assignment, against the fund itself.

The assignment by George K. Budd to Sanford B. Kellogg, trustee, to secure the payment of a debt to Page & Bacon, duly acknowledged and recorded, being taken and considered as valid, has the effect to pass the property and effects embraced in it to the said Kellogg, as such trustee, against the subsequent assignee.

Assuming this to be so, then the proceeding to recover the property claimed may be against the party having the property and effects in his hands, and need not (perhaps could not) be against the fund. Here, the plaintiff's petition is proceeding upon the assumption that the effects now sought to be recovered constituted no part of the trust fund in the hands of Gardner, the second trustee.

Courts of equity support assignments not only of *choses in action* but of contingent interests and expectations, and also of things which have no present actual potential existence, but rest on mere possibility only. (See *Mitchell, Assignee of Ropes, v. Winslow et al.*, 2 Story's Rep. 631.)

A. and B. being engaged in 1839 in the manufacture of cutlery, borrowed of C. a sum of money, payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of the said manufactory, *which they might at any time purchase for four years from that date, and also all the stock which they might manufacture or purchase during the said four years.* On the 26th of August, 1843, A. and B. filed their petition to be declared bankrupts, and subsequently were so declared, and an assignee was appointed. On July

16th, 1842, for breach of the conditions of the mortgage, the agent of C. took possession of the property, including the machinery, &c., which were in the possession of the manufactory when the mortgage was made, and also machinery, tools, and stock in trade, which had been made and purchased after the execution of the mortgage. On petition of the assignee in bankruptcy of A. and B. for an order of court authorizing him to take possession, it was held, upon this state of facts, 1st, that the mortgage and possession taken in July 16, 1842, constituted such a lien in favor of the mortgagee to the property acquired subsequent to the time of executing the mortgage, as is protected under the provision in the second section of the bankrupt act; 2d, that such stipulations in a mortgage, in regard to property subsequently acquired, protect such property from other creditors of the mortgagor. Judge Story, in his opinion, after stating the facts and general principles governing such transactions, says: "Here, the true question is not whether the assignment of the property to be acquired *in futuro* is good at law, but whether it is good in equity; for if it be, then, independently of any fraud (which is not pretended) as the assignee can take only what the bankrupt had a title to, subject to all equities, it follows, as a matter of course, that the petitioner, (the assignee,) has no claim on which he can found himself for relief under his petition. So that the question is, in reality, narrowed down to the mere consideration of this, whether the present mortgage, as to the future machinery, tools, and stock in trade to be put into the factory, (for there is no controversy as to those in *esse* at the time of the assignment,) is valid or not against the mortgagor?"

He says: "Upon the best consideration which I am able to give the subject, I think it good and valid. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests which are absolutely fixed and *in esse*. On the contrary, they support assignments not only of *choses in action*, but of contingent interests and expectancies, and also of those which have no pres-

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ent actual or potential existence, but rest in mere possibility only."

In respect to the latter, it is true that the assignment can have no positive operation to transfer, *in presenti*, property in things not in *esse*; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in *esse*; and it may be enforced as such a contract *in rem* in equity. A different view has been taken by other courts, at law at least. (*Moody v. Wright*, 13 Metc. 27. *Mogg v. Baker*, 3 Mees. & Wels. 195. *Gale v. Burrell*, 7 Adol. & Ellis; N. S. 850.)

(We now have no distinction between law and equity.) Taking, therefore, the deed of trust made in this case by Budd to Kellogg as being valid, (for there is no pretence of fraud in it,) then the sale by the trustee, Kellogg, conveyed the property and effects sold to the purchasers, and they have the right to sue for it, not by pursuing the fund, but any one in whose hands their effects and property may be found.

The judgment below is reversed, and the cause remanded; the other judges concurring.

WHITMORE & OTHERS, Plaintiffs in Error, vs. THE STEAM-
BOAT CAROLINE, Defendant in Error.

1. It is not *prima facie* within the scope of the employment of a steamboat, or the authority of her officers, to carry specie for hire; and in order to hold the boat or her owners liable for the loss of money entrusted to the clerk by a passenger, a known and established usage for steamboats to carry money for hire on account of the owners, must be shown. (*Chouteau & Valle v. Steamboat St. Anthony*, 16 Mo. Rep., affirmed.)
2. The implied undertaking of a common carrier to carry the baggage of passengers, does not include more money than a reasonable amount to pay traveling expenses.

Error to St. Louis Circuit Court.

This was an action under the act concerning "boats and vessels," (R. C. 1845,) to recover the value of a bag of gold

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belonging to the plaintiffs, lost while in custody of the clerk of the steamboat Caroline, to whom, as alleged in the petition, it had been delivered for transportation from St. Louis to Pekin by an agent of the plaintiffs, who was a passenger on the boat.

At the trial before a jury, Sears, the plaintiffs' agent, testified that he received from the plaintiffs \$1500 in gold to be invested for them in the purchase of wheat upon the Illinois river; that the gold was placed in a bag, and he went with it on board the steamboat Caroline, then lying at the port of St. Louis, bound for the Illinois river; that he applied for passage for himself, and delivered the bag of gold to the clerk, to be carried to his port of destination, and that the clerk received it; that he was informed the next morning that the safe of the boat had been robbed and the bag of gold taken. This witness further stated that he had known boats running from St. Louis up the Illinois river to take specie and be paid for it; that he had himself delivered money to clerks of boats to be carried and had paid for it, and had done this in one instance where he was a passenger on the same boat; but that he was not a river man, and only spoke from his personal knowledge. He also stated on cross-examination that when he went on board the defendant, he took passage to Bath or Havanna.

Pomeroy, a commission merchant in St. Louis, testified that his firm used to send money up the Illinois river to their customers for grain, but more recently had generally remitted through express companies; that they frequently had consignments of grain, with the request that the proceeds should be sent by the same boat, on her return, and in such cases, the boats did not charge any thing for carrying the money, but when the money was sent on transient boats, they would pay for it; that he only spoke of his own transactions, and did not know what the custom was.

Gregory, who had been a shipping clerk and salesman on the St. Louis levee for about six years, testified that it was the custom of boats running from St. Louis in the Illinois river trade to carry specie, when entrusted to them, as much as any

other kind of freight, sometimes gratuitously and sometimes for reward, and that money was usually delivered to the clerk of the boat. On cross-examination, he stated that it was customary for boats to carry money, whether the passenger was on board or not; that when the owner was on board as a passenger, no receipt was taken, and when no receipt was taken, the money was carried as a favor.

Smith, a clerk of plaintiffs, testified that he knew it to be the custom of boats running in the St. Louis and Illinois river trade to carry specie for reward and without reward; that receipts were sometimes taken and sometimes not; that he had shipped specie various times, sometimes taking bills of lading and sometimes not, always delivering it to the clerk of the boat; and that in cases where he had shipped specie, the owner did not accompany it.

This was all the evidence introduced by the plaintiffs, and the Circuit Court instructed the jury that, under it, they could not recover in this action. They submitted to a nonsuit, and after an unsuccessful motion to set it aside, sued out this writ of error. The cause was submitted on briefs.

Glover & Richardson, for plaintiffs in error. 1. When persons hold themselves out as common carriers, the legal presumption is that they are carriers for hire of all articles embraced within the general terms goods, wares and merchandise, *including specie*; and if any thing falling within the scope of these terms is excepted by them, the burthen is on them to establish the exception. (2 Kelly, 353. 2 Story's C. C. R. 34.) If specie is merchandise, and steamboats hold themselves out as carriers of merchandise, there is no more reason why a plaintiff should be required to prove specifically that the owner assented to the master's carrying specie, than that he specially assented to the carrying flour, or tea or silks. The presumption is, that the owner pays some attention to acts of his agents, and is aware of the usual course of business, and he must take the burthen of showing the contrary if he asserts it. (1 Flor. Rep. 403. 2 Story's C. C. R. 37. 18 Ver-

mont, 140. 2 Harrington, 48.) This is reasonable; for to bring home to the owners express proof of authority given by them to the master to carry specie or any thing else must in general be impossible; whereas, if the owner has limited the power of his agent, he can always show it. (12 Ala. Rep. 352. 23 Vermont, 186, 206.) That some persons, under peculiar circumstances, were not charged for carrying specie, or that passengers who had paid fare were not charged is of no importance, if it was within the scope of the boat's employment to carry it for hire. The facts are true of every other sort of freight. Thus, a passenger who accompanies a shipment of grain often pays no passage money. This case is unlike many others in this: There was no proof by the defendant as to what was the general employment of the boat—no showing that the master had been forbidden to carry specie—nothing to limit the responsibility of the boat. If it was shown to be the usage of trade for boats to carry money for all persons indifferently, as well as goods, then the responsibility peculiar to the common carrier extends to both. (Angell on Carriers, p. 213, §209.)

It being proved that it was the known custom of boats in the trade in which the Caroline was running, to carry specie for hire, and that it was as much the course of trade there to carry specie for hire as any thing else, ought to and did put the *onus* on the defendants to show that they had not authorized the Caroline to carry it; or if not, the plaintiff had at least the right to insist before the jury that the owners must have known the course of trade.

There was no proof in this case that the master had any privilege to use the boat of the owners to carry any thing on his own personal account. The legal presumption then was, that whatever he did was for account of the boat.

But the master was the general agent of the owners, as such had power to contract to carry any thing usually carried in the trade where he was running, and even had he been privately instructed not to take specie, the vessel would have been bound

by his contract, unless the instruction was brought home to the shipper.

Knox & Kellogg, for defendant in error. 1. As there was no evidence that the boat was to carry the money for hire, or that the owners sanctioned the carrying of money for hire, the instruction of the Circuit Court was correct. (*Chouteau & Valle v. Steamboat St. Anthony*, 16 Mo. Rep. 216.) 2. A steamboat, though a common carrier, is not liable for money which a passenger may have in his possession, except so much as is necessary or convenient for him. (Angell on Carriers, sec. 115.) 3. There is no such contract set forth in the petition of the plaintiffs, nor was there any such contract proved, as would sustain an action against the boat under the act concerning "boats and vessels." 4. There is a material variance between the petition and the proof. The petition states a contract for passage from St. Louis to *Pekin*. The evidence is that plaintiffs' agent took passage for *Bath* or *Havanna*. (Chitty on Plead. 333 and following.)

SCOTT, Judge, delivered the opinion of the court.

The instruction given at the instance of the defendant was proper. The evidence given established no usage for steamboats to carry money for hire. This case is similar to that of *Chouteau & Valle v. Steamboat St. Anthony*, (16 Mo. Rep. 216.) We see no reason for departing from the law as stated in that case. The evidence here shows what usually appears in actions of this sort, that persons are willing to have their money carried as a favor, and at the same time, to hold the boat liable for its loss. Freight or money must be proportioned to the risk assumed. No owner of a boat would permit her to carry money, without a reward compensating for the risk, if he was aware that he would be liable in the event of its loss. Persons use the captains or clerks of steamboats to carry money gratuitously, and hire is never heard of until the money is lost, and then some person is hunted up to prove that some times in the course of his life he carried money on a steamboat for

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hire, and this is showing a usage. If boats would invariably charge a compensating hire for carrying money, and this was universally known, the business of carrying money by boats would soon be at an end. Persons cannot trust money with clerks to be carried as a favor, and afterwards, when the money is lost, be permitted to show that it was to be transported for hire. This thing of hire is scarcely ever heard of, but in case of loss, and then, to make the boat or owner liable, would be great injustice. There is no reciprocity in it. The boats, in this way, would be made public carriers for all the money entrusted to their officers for transportation, and their owners would receive no compensation for it. In no case in this court has any thing like a usage been established to carry money for hire by steamboats. If freight is charged for money as other merchandise, why are not bills of lading or receipts regularly made out as for other things? The owners of merchandise cannot make a secret bargain with the agents of a boat that their merchandise shall be transported gratuitously, and yet hold the boat liable as a common carrier. So, there is nothing in the idea that the officers, by carrying money as a favor, gain patronage for their boats. If one may do this, all may do it. All boats being subject to the same law and all charging hire for the transportation of money, one could not obtain an advantage over another in this respect.

The implied undertaking of a common carrier to carry the baggage of a passenger has its limitations, and does not extend beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience. It is never admitted to include merchandise. Nor does the implied undertaking include a large sum of money. It cannot cover more than a reasonable amount necessary to pay traveling expenses. (Angel on Carriers, 116.)

With the concurrence of the other judges, the judgment will be affirmed.

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CHOUTEAU & VALLE, Defendants in Error, vs. STEAMBOAT
ST. ANTHONY, Plaintiff in Error.

1. Evidence of a custom by boats to carry bank bills for customers to conciliate their patronage, is insufficient to establish a custom of carrying bank bills for hire.
2. The principle that a bailee, who gratuitously undertakes to do an act, is liable for negligence in doing it, is not applicable to steamboats.
3. Same case, 16 Mo. Rep. 216, affirmed.

Error to St. Louis Court of Common Pleas.

This was a statutory action against a steamboat, brought in 1846, for an alleged breach of a contract to carry \$572 in bank notes from St. Louis to Pell's landing, on the Ohio river. The case now comes here after another trial since it was last reversed and remanded. (16 Mo. Rep. 216.) It was proved that the letter containing the money was delivered to the clerk of the boat, and that \$420 of the amount was missing, when the letter reached its destination. The plaintiff then examined a number of river men, for the purpose of showing a custom of boats to carry bank notes for hire on account of the owners. Several witnesses testified that it was common for boats to carry packages of money for their customers, but that as a general thing, no charge was made, the object and expectation being to get the patronage of those whom they thus accommodated. Frequently however, charges were made, and this was generally the case when the money was carried for strangers. In either case, as some of the witnesses stated, the carriage was on account of the owners and at their risk. Some witnesses *considered* that boats had a right to charge in every case, whether there was a special contract in advance or not. There was also evidence of a declaration by the clerk of the boat, before the letter was delivered at its destination, that "they intended to have five dollars" for carrying it. The following instructions were given :

1. If the jury believe from the evidence, that the defendant undertook to carry the package of money in controversy from

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St. Louis to Pell's landing, and failed to deliver \$420 of said money or bank notes, then the jury should find for plaintiffs.

2. If the jury believe from the evidence, that it was the custom of boats in that trade to carry packages of money or bank notes for hire, and that the defendant received the package in question, to transport the same from St. Louis to Pell's landing, then, *prima facie*, the defendant did undertake to carry the same for hire.

3. If the package in question was received on account of the boat, to be transported on her account, and said package was received for transportation for hire, the defendant is liable for the loss, if any occurred.

4. If the said package was not to be transported for hire, or it was not the custom of the boats in that trade to carry said packages for hire, or if said package was carried by the captain as a matter of courtesy, not to be paid for, or if the said package was to be carried by the captain on his own account, and not on account of the defendant, then the defendant is not liable.

5. If the captain held himself out as agent of the boat, in undertaking to carry bank bills, as being within the usual scope of the services and employment of the boat, and the owners of the boat knew that the hire, in such cases, was on their account, then the boat is liable for the loss, if any occurred, unless it appears that this transaction was on the account of the officers or some of them, and not on account of the boat.

6. If it was not the custom of boats to carry such packages for hire, then the plaintiffs cannot recover, unless it was understood or agreed that this package was to be carried for hire, and the owners of the boat knew that it was to be so carried for hire on account of the boat, or it was the custom of the defendant, with the knowledge of the owners, to carry such packages for hire on account of the boat.

There was a verdict for the plaintiffs.

Hudson & Thomas and *B. Bates*, for plaintiff in error.

C. B. Lord, for defendants in error.

Scott, Judge, delivered the opinion of the court.

This is the third or fourth time this cause has been in this court, and it would be some consolation to know when there will be an end of it. We have examined the facts upon the record, and do not see that the case is now materially variant from that presented when it was here before. The evidence of the declaration of the clerk, that he would have five dollars for carrying the package, can have little or no weight in determining this controversy.

1. The question involved is an important one, as it should be well understood, if boat owners are liable for every sealed package of bank bills a clerk may receive to be carried on the boat. When this case was here before, the opinion was expressed that the evidence was insufficient to establish the custom of boats carrying bank bills for hire. In the case before us, there is no such evidence of such usage as would warrant an instruction upon it. No witness testifies that those for whom bank bills were carried without reward, were under any obligation in return to bestow on it their patronage. So, the act of carrying is gratuitous, as it was said to be done in expectation of return freights or of future favors, for which the party favored was under no obligations.

2. The first instruction was evidently erroneous. It seems it was conceived on the principle that, if a bailee gratuitously undertake to do an act, he will be liable for negligence in doing it, although he was not bound to do it. This principle, however correct, when applied to individuals, can have no application to steamboats. A steamboat is not a person who can undertake a gratuitous bailment.

The second, third and fourth instructions were erroneous. There was no case for the fifth, and the sixth, with the omission in its beginning of what relates to custom, was the only one applicable to the merits of the case.

3. When this cause was formerly here, the law respecting the question involved in it was carefully looked into, and we see no

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reason for departing from the opinion then expressed. The opinion, it seems to us, is full, and covers the ground of this case. The other judges concurring, the judgment is reversed, and the cause remanded.

CULLUM, Respondent, *vs.* CUNDIFF, Appellant.

1. The supreme court will not revise the discretion exercised by inferior courts in allowing amendments, unless it clearly appears that the discretion has been abused to the prejudice of the party.

Appeal from Jefferson Circuit Court.

Action to recover a balance due upon a note, after a sale of real estate under a deed of trust given to secure it. The defendant answered, setting up fraud in the sale, by which the plaintiff acquired the title to the property covered by the deed of trust for much less than its value. When the case was called for trial, the defendant moved for leave to file an amended answer and for a continuance. He read an affidavit in support of his motion, stating that he had recently discovered that he could prove that the note sued upon was without any consideration, and that he had not relied upon this defence in his answer previously filed, because he did not then suppose he could sustain it by proof. His motion was overruled, and after a judgment against him, he appealed.

Green, for appellant. The amendment should have been allowed. (New Practice Act of 1849, art. 11, secs. 5 and 6.)

Nbell & Beal, for respondent.

LEONARD, Judge. Although we frequently revise the exercise of discretionary power on the part of the lower courts, we never reverse a judgment in such a case, unless we see very clearly that the discretion which the law has confided to the court has been abused to the prejudice of the party.

We cannot say so here. Although certainly the courts of

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original jurisdiction ought to be very liberal in allowing amendments in order to get at the very right of the case, care must be taken that parties do not delay the collection of demands due from them under the mere pretence of amendments. Here the party failed to disclose the defence he proposed to set up, and gave but a poor excuse for not having originally relied upon it in his answer. Under these circumstances, we cannot help him. The judgment is affirmed.

GARTH, Appellant, vs. ROBARDS, Respondent.

1. A person who goes to California with the intention of returning, leaving his family and property in Missouri, although he may remain there engaged in business for several months, is not within the last clause of the seventh section of the second article of the statute of limitations. The operation of the statute is not suspended during his absence.

Appeal from Hannibal Court of Common Pleas.

This action was brought in April, 1853, to recover an unappropriated balance of money advanced by the plaintiff to the defendant in 1846, for the purchase of hemp on the plaintiff's account. The defendant, in his answer, denied the justice of the demand, and relied upon the statute of limitations.

At the trial before a jury, it appeared in evidence that in April, 1849, the defendant left Hannibal, his place of residence, for California, where he arrived in the winter of 1849-50. He remained there until October, 1850, and returned to Hannibal in January or February, 1851. During his stay in California, he was engaged part of the time in mining, and part of the time in keeping a provision store. In addition to much other real property in Hannibal, he left behind him a dwelling house, in which his family, consisting of a wife and several children, lived during his absence. There was evidence of declarations made by him before leaving of an intention to return.

The following instruction, numbered as the second, was given to the jury, among others :

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“The court instructs the jury that, if they believe from the evidence that defendant, Robards, went to California in the spring of 1849, on a trading expedition, leaving his family in his own mansion house, their usual place of residence in this city, keeping house—his family consisting of wife and children—with a large amount of property, with the intention, when he left, to return as soon as he completed the object of his expedition, and did so return in the winter of 1850–51, his family continuing to keep house in said mansion house during the time of said absence, this did not destroy his residence here, and is not to be regarded in computing the said five years. But on the other hand, if they believe from the evidence that, after he reached California, he changed his intention and purpose, and intended to remain permanently and abide in California, then the time of his absence from Missouri shall not be taken into account, in considering the question whether it was five years from the time such cause of action accrued till suit was brought.”

The plaintiff took a nonsuit and afterwards appealed.

Mr. *Broadhead*, for appellant. The evidence brings the defendant within the saving of the second clause of the seventh section of the second article of the statute of limitations. The object of that clause clearly is to prevent the statute from running during the time when the plaintiff has not a complete and easy remedy by the ordinary process of law. The ordinary process is a summons, which is served upon the defendant personally, or by leaving a copy at his “usual place of abode.” In this case, it could not have been resorted to; for it will not be pretended that the defendant’s “usual place of abode” was in Missouri, whilst he was mining or selling provisions in California. The plaintiff was not obliged to resort to the extraordinary process of attachment, (1 Mo. Rep. 484.) The expression “depart from and reside out of the state” does not imply that the defendant should have established his *domicil* elsewhere. Domicil and residence are not synonymous terms. Two things must concur to constitute domicil; first, residence;

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and secondly, the intention of making it the home of the party. (2 Story's Conflict of Laws, §44. 1 Vattel, 163. 2 Bouvier's Law Dic. 458.) The question of residence is one of fact and not of intention. (1 Wend. 43. 4 Wend. 602. 8 Wend. 134-40. 5 Pick. 231. 17 Id. 231. *Isham v. Gibbons*, 1 Bradford's Surrogate Rep. 70-84, cited 2 Am. Lead. Cases, (new ed.) p. 707. 1 Selden, 428. 19 Wendell, 11.)

There was no appearance for the respondent.

SCOTT, Judge, delivered the opinion of the court.

1. The only question presented here for our determination is that contained in the second instruction given by the court. That question is, whether the circumstances detailed in that instruction will prevent a bar by the statute of limitations, and bring a defendant within the last clause of the seventh section of the second article of the act prescribing the times of commencing actions, which enacts that if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

We can see no reason why the statute should not run against the plaintiff under the circumstances of this case. All the ordinary process of the law authorized for the enforcement of demands was at his service. His writ, under our law, could have been served so as to warrant a general judgment, binding all the goods and chattels, lands and tenements of his debtor, and there was ample property to satisfy his demand. Under such a state of facts, there could not possibly exist any reason for preventing a bar of the statute, and we would not be warranted in inferring that the legislature designed to interpose any obstacle to its running.

The judgment is affirmed, the other judges concurring.

McKEE & OTHERS, Respondents, *vs.* BROOKS & MEEGAN,
Appellants.

1. A privilege in a lease to the lessee of doing such *quarrying* on the demised premises as was necessary to carry on his business as a boat builder, *was held* to confer a property in the rock so quarried. (Judge LEONARD dissenting.)

Appeal from St. Louis Circuit Court.

This was a bill in chancery, filed in 1848, to compel an account for the value of rock, quarried upon premises demised by the complainants to the defendants.

The lease contained a clause to the effect that the lessees should have "the full and perfect right to do all such quarrying, grading, levelling, and make such alterations upon the demised premises as may by them be deemed requisite and proper for carrying on and managing their business." The cause was referred to a commissioner, who reported the following facts: That the defendants leased the premises described in the bill, fronting on the Mississippi river, for the purpose, as understood and agreed by both parties, of building and repairing boats, and that they took possession of the premises under the lease, and carried on said business thereon; that the defendants quarried rock on the premises of the nett value of \$410 over and above all expenses, which quarrying was requisite and proper to put the premises in good condition for their business; but that part of the premises where the quarrying was done had not been used for that purpose, because materials for boat building had been too dear to justify the defendants in carrying on the business.

Upon these facts, the commissioner decided that the defendants were accountable to the complainants for the nett value of the rock quarried. Exceptions were filed to the commissioner's report, but they were overruled, and the report confirmed. The defendants appealed. The cause was submitted on written arguments.

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T. B. Hudson, for appellants. 1. The authority to quarry stone, contained in the lease to the appellants, gave them the right to sell the stone when quarried. (Taylor's Landlord and Tenant, 165, 170.) 2. The failure of the lessees to use the premises for a portion of the term for which they had been rented could not create a liability not contemplated by the terms of the demise. It could not be of the slightest importance to the lessors, whether the lessees used the premises or not, so long as they received the rent. Besides, the term had not expired, and the lessees were not bound to use the premises *immediately*, if at all.

J. R. Shepley, for respondents. 1. The privilege given to the defendants by the lease was a simple right to remove the rock, and conferred upon them no beneficial interest in the rock so removed. 2. Even if this were otherwise, yet the fact was found by the commissioner that the portion of the ground upon which the quarrying was done was never used for the purpose for which alone such quarrying was allowed.

SCOTT, Judge, delivered the opinion of the court.

In our opinion, the contract between the parties gave the rock quarried to the lessees, and they were under no obligations to account for it to their landlords. The lessees, by the contract, had a full and perfect right to do all such quarrying, grading, levelling, and make such alterations upon the demised premises, as might by them be deemed requisite and proper for carrying on and managing their business. It was found as a fact, that the quarrying done was requisite and proper to put the leased premises in good condition for the business of the lessees. We are at a loss to conceive a ground on which a contrary determination can stand. Had the rock quarried been thrown into the river—had the lessees permitted it to be taken out of their way by others as it was quarried, can it be perceived how they would have been liable for it to their landlords? That they did not do either of these things, but made a profit of it, cannot charge them with a liability. If a lessee takes a

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farm at a rent, with full liberty to clear an acre of timbered land, in addition to that already cleared, can he not cut down the timber and burn it up, or may he not cut it into cord wood and sell it at a profit? Would he, in either of these events, be liable to his landlord for the timber removed? The right to quarry in the one case, and the right to remove the timber in the other, without restriction or condition, would give to the lessee the liberty of disposing of the rock in the one case and of the wood in the other at his discretion, without any liability for an account to his landlord.

The fact that the lessees did not use the place cleared for their business, by reason of a change of circumstances which rendered it unprofitable, is their misfortune, and it would be hard to convert such misfortune into a source of increased responsibility, when otherwise it would not have existed. The quarrying was done in good faith under the terms of the agreement, and the fact that the place cleared by the lessees was not used by them, does not affect the landlords in any way, as they continued liable for the rent, notwithstanding they did not carry on their business.

Judge Ryland concurring, the decree will be reversed, and the bill dismissed.

LEONARD, Judge. I dissent from the opinion of the majority of the court in this case. In my judgment, the lessee acquired no property in the rock. His contract was for the use, and not for an absolute interest in any part of the leased property. The use to which the lot was to be applied, (boat building,) and the permission contained in the lease to the lessees, to "do all such quarrying, grading, levelling, and make such alterations upon the lot as they might deem requisite for carrying on and managing the business of the lessees upon the premises," did not change the character of the transaction, in reference to the stone necessarily taken up in putting the ground into a proper condition for the use intended. When the lease is of a mine or a stone quarry as such, the case is differ-

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ent. There, the use given by the lease consists in the privilege of taking up and disposing of these parts of the leased property, and unless this were allowed, the lessee would acquire nothing by the contract. So, too, in the lease of forest land for cultivation, as a farm in a new country, where the wood is of no value and generally burned on the ground as worthless. There may be no difficulty in implying from the transaction permission to the lessee to dispose of the wood as he pleases. Here, however, the lease is of a lot in the vicinity of the city for a boat yard, and not of a stone quarry as such, and although the lessees may take up the stone, as far as may be necessary, to prepare the lot for this purpose, and have a right to use it during the term, and if it were worthless, might safely have thrown it into the river, yet it seems to me very difficult to imply from this clause in the lease a grant of the absolute property in it, if it were of any real substantial value as property, as it seems to have been; from the large profit the lessees made out of it, over and above the expense of quarrying.

Entertaining these views upon this point, which is the only one made in the case, I think the decree ought to be affirmed.

JOHNSON & OTHERS, Plaintiffs in Error, vs. CLARK COUNTY COURT, Defendant in Error.

1. A writ of error does not lie to the order of a county court removing a county seat. (*Tetherow v. Grundy County Court*, 9 Mo. Rep. 117, affirmed.)

Error to Clark Circuit Court.

This was a proceeding under the statute (R. C. 1845, ch. 40,) for the removal of the county seat of Clark county from Alexandria to Waterloo. Commissioners were appointed, who selected Waterloo as the site, and an election was ordered, pursuant to the statute, to take the sense of the tax payers upon the subject. Upon the return of the poll-books to the county court, John W. Johnson and other citizens of the

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county appeared, and offered to prove by the assessor's books and the assessor, that a majority of the inhabitants of the county who paid taxes on land, and of the householders, did not vote for the removal. The county court decided that they could not go outside of the poll books to hear any evidence, and it appearing that a majority of the votes cast were in favor of the site selected, an order was made that Waterloo should be the permanent seat of justice. Johnson and others excepted, and appealed to the Circuit Court, where, the orders of the county court being affirmed, they sued a writ of error out of this court.

W. N. Grover appeared for Johnson and others.

No appearance on the other side.

SCOTT, Judge. This case is similar to that of *Tetherow v. Grundy County Court*, (9 Mo. Rep. 117,) and the writ of error will be dismissed. Writ dismissed.

JOHN KEETON'S HEIRS, Appellants, vs. WM. KEETON'S ADMINISTRATOR, Respondent.

1. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations.
2. If a complainant relies upon a disability as exempting him from the operation of the statute of limitations, he should set it up in his bill.
3. It is settled that a person out of this state, but within the United States, is not within the meaning of the words "beyond seas" in the statute of limitations of 1825.
4. Cumulative disabilities are not allowed. So, where a cause of action accrues in favor of an infant female, the statute begins to run from the time she becomes of age, although she previously marries. But where two disabilities exist when the cause of action accrues, the statute does not begin to run until they are both removed.
5. One party, who is saved from the operation of the statute of limitations by a disability, can obtain no relief upon a bill in equity jointly with other parties who are barred.
6. Where a bill in chancery, to which limitation was set up as a bar, contained

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no allegation of any exempting disability, but it appeared in evidence that that some of the complainants had been under a disability which prevented a bar, though the others had not, the supreme court reversed a decree dismissing the bill, in order to afford an opportunity to amend, so as to save the rights of those who were not barred.

7. Facts stated, which, in the opinion of the court, showed fraud in a sale by an administrator of slaves belonging to the estate of his intestate.

Appeal from St. François Circuit Court.

This was a bill in chancery, filed in March, 1848, by the heirs of John Keeton, to recover certain slaves, (with the value of their hire and services,) claimed by them to have been held by William Keeton, the defendant's intestate, (who had administered upon the estate of their father,) as their trustee, and by the defendant to belong to his intestate's estate.

About the year 1824, John Keeton, who had previously resided in Franklin county, Tennessee, where he had become somewhat embarrassed, came to Jefferson county, Missouri, leaving behind him his farm, with other property, and his family, consisting of a wife and six children, and bringing with him about twenty slaves, in order, as it appeared, that he might prevent them from being sold under execution, and with the avails of their labor pay off his debts. The male slaves were employed by him, after he reached Missouri, in mining, and the females were hired out. Being successful in his mining operations, he returned to Tennessee in the spring of 1825, and according to one witness, again in the spring of 1826, each time taking with him money which he applied to the payment of his debts. There was evidence of a difficulty between him and his wife, which prevented them from living together, and of declarations by him of an intention to make Missouri his permanent home, and other evidence of declarations of his intention to return to his family in Tennessee, after he had made money sufficient to discharge his debts. On the 2d of September, 1826, soon after his second return from Tennessee, he died in Jefferson county, leaving there the slaves and some other personal property, but no real estate. On the 8th of the

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same month, letters of administration on his estate were granted to M. Taney. In March, 1827, upon the application of William Keeton, who had previously obtained letters of administration in Tennessee, an order was made granting letters *de bonis non* to him, revoking the letters to Taney. The order recited that it was proved to the court that the applicant was of kin to the deceased and a creditor of his estate. In September, 1827, William Keeton made a settlement of his administration in this state, showing a balance of money in his hands of \$288 67, and containing a list of the slaves in his possession, twenty-one in number. No other settlement was made by him until November, 1830, when he made his final settlement, showing no increase of assets since the former settlement, but disbursements to the amount of \$231 65, leaving \$57 62 to be distributed. The record showed no order of distribution, or other order in relation to this balance, nor any order in relation to the slaves. It appeared that in the fall of 1827, the administrator carried all the slaves belonging to the estate to Tennessee. In the settlement of his administration there, he was charged with their hire from January 1st, 1828, up to the time of their sale in 1830, as hereinafter stated. No hire for the year 1827 was charged either in the Missouri or Tennessee administration. The balance due the estate on the final settlement in Missouri was charged to the administrator in the Tennessee administration.

In February, 1830, the court of Pleas and Quarter Sessions of Franklin county, Tennessee, made an order for the sale of the slaves. The order recited that there were unpaid debts against the estate to the amount of upwards of a thousand dollars, to pay which a sale of some of the slaves was necessary, and that the sale of the remainder was believed to be necessary, in order to make an equal distribution among the heirs, and that a sale was desired by all the heirs who were of age. Neither the time, terms, place nor manner of sale were prescribed. Under this order, the sale was made by the administrator at public auction, for cash, on the 5th of March, 1830,

at the farm of John Keeton, the home of his widow and children, all of whom, as was testified, were present or represented at the sale. John Keeton had one son and two daughters by his first marriage, and three daughters by his second marriage. The five daughters and their husbands were the complainants in this suit. It appeared that Catharine, the eldest daughter, though of age at the time of the sale, was married to Robert Keeton, who was present and bid off two of the slaves. Sytha, the next daughter, was, as one witness testified, some eighteen or twenty years of age, but it did not appear whether she was then married. All the other daughters were under age and then unmarried. Clarissa, the youngest, was born in November, 1822, and not married until 1837 or 1838. One witness, however, stated that she was seventeen years old when she married in 1838. It was in evidence that much dissatisfaction was expressed by the persons present, because the sale was for cash, instead of on the usual credit, and that many persons were prevented from bidding in consequence; that the terms were not known until the day; and that the slaves would have brought better prices if they had been sold on the usual terms. It did not appear what, if any, notice of the sale was given, and a witness, who lived in the neighborhood, stated that he never heard of it until it had taken place. Every witness, who undertook to speak positively upon the subject, testified that all of the slaves were bid off by William Keeton, except the two bought by his brother, Robert. There was much evidence that, after the sale, William, with the knowledge of the heirs, claimed the slaves bid off by him as his own, and exercised ownership over them, and not long afterwards removed a portion of them to Missouri, where they remained in his possession until his death in 1845, when they came into the hands of his administrator, from whom, they and their increase are sought to be recovered in the present suit. One witness, however, testified to a declaration by William Keeton after the sale that he had bid off the slaves for the benefit of the widow and heirs.

It was claimed by the defendant that the slaves were bid off by William Keeton at the sale for Elizabeth Keeton, who was his sister, and the widow of John Keeton; and there was produced in evidence a bill of sale dated April 23, 1832, more than two years after the sale, from said William to Elizabeth for the slaves, eighteen in number, reciting that they had been purchased by her at the sale *and then delivered*. There was also produced a bill of sale of the same date from Elizabeth back to William for ten of the same slaves, reciting that she was indebted to him, after deducting her own distributive share in the estate and those of her three daughters, for whom she was guardian, in the sum of \$2,691, for advancements made by him for the estate, in payment of which he had agreed to take the negroes.

At the November term, 1830, the court appointed commissioners to settle with the administrator, who, on the 10th of March, 1831, reported a balance in his hands of \$5,002 05½. He was charged with \$6,689 99 as the amount for which the slaves sold. At the February term, 1832, commissioners were again appointed to settle, who in March, 1833, reported that the administrator, since the last settlement, had paid debts amounting to \$923 28½ for which he was entitled to a credit.

In the settlement of her accounts as guardian of Margaret, Martha and Clarissa, her three daughters, Elizabeth Keeton charged herself with \$586 07½ received from the administrator of John Keeton, as the distributive share of each in the estate. There were also produced in evidence receipts from the husbands of Martha, Margaret and Clarissa, dated respectively February 12, 1836, November 17, 1838, and March 30, 1841, acknowledging the receipt in full of the distributive shares of their wives, and releasing the administrator and guardian. The first two of these receipts did not specify the amount received, but the last stated it at \$600. The receipts of the son of John Keeton and of the husbands of his two remaining daughters were also produced, dated April 9, 1831, March 5, 1831, and

April 9, 1831, for \$586 07 $\frac{1}{2}$ as the respective distributive shares of each.

Evidence was offered tending to show that these receipts were unfairly obtained, and that at least some of the shares had not been paid, or not in full, and that others were paid in negroes or in land. A number of witnesses testified that William Keeton had no property of consequence before he became the administrator of John Keeton, and did not pay his debts, and that afterwards he assumed the appearance of being a man of wealth.

It was agreed that the laws of Tennessee in relation to the sale of slaves by administrators should be considered in evidence.

After hearing the evidence, the Circuit Court dismissed the bill, and the complainants appealed. The case was orally argued by Mr. Frissell and Mr. Munford for appellants, and by Mr. Noell, for respondent.

Mr. *Frissell* argued the following points: I. The evidence showed that John Keeton died a citizen of Missouri, and so the Missouri administration was the principal one, and the Tennessee the ancillary. II. The evidence showed fraud in the sale of the slaves, and fraud in the administration generally. The single fact that the administrator became the purchaser was sufficient to avoid the sale. (*Michaud v. Girod*, 4 Howard, 556-7. *White's Leading Cases in Equity*, 127, 139.) III. As the sale was void, the administrator was not thereby divested of his character of trustee. IV. The statute of limitations cannot avail the defendant. 1. If a trustee has ever been allowed to hold trust property under this statute against the *cestui que trust*, it has been in the absence of fraud and after a long acquiescence by parties competent to sue. 2. The evidence shows that at least two of the complainants were under disabilities at the time of the sale, one of which still continues, and the other of which was not removed until within five years before the commencement of this suit. (Upon the statute of limitations, the following authorities were cited: Hill on

Trustees, 263. *Falls v. Torrance*, 4 Hawks, 412. *Bird v. Graham*, 1 Iredell's Eq. Rep. 196. *Prevost v. Gratz*, 6 Wheat. 481, 497-8. *Boon v. Chiles*, 10 Pet. 177. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190.)

Mr. *Munford* argued the following points: I. The purchase by the administrator at his own sale was a fraud in law which avoided the sale; (same authorities cited by Mr. Frisell.) II. The evidence showed fraud in fact in the sale. III. The statute of limitations is no defence. 1. The trustee of a direct trust, who has been guilty of actual fraud, has never in any case been allowed to protect himself by the statute of limitations at law. (*Michaud v. Girod*, 4 Howard (U. S.) Rep. 556-7.) 2. The statute at law will not in any case run against the trustee of an express trust. An administrator is such a trustee, and his character as trustee is not divested by a purchase at his own sale, even though made in good faith. (4 Hawks', 412. 3 Johns. Ch. Rep. 190.) His possession will not be regarded as adverse, even though he declares it so to be. Having obtained possession in the capacity of trustee, he is not allowed to divest himself of the trust. Numerous cases can be cited, where equity has given relief against administrators, after the lapse of time sufficient to have barred an action at law. (*Michaud v. Girod*, 4 Howard (U. S.) Rep. 556-7. 3 Johns. Ch. Rep. 190 and cases cited. *March v. Russell*, 3 Mylne & Craig, in 14 Eng. Ch. Rep. 2 Merivale, 360. 2 Keen, 750, in 15 Eng. Ch. Rep.) IV. The single question in the case then is, have the heirs slept upon their rights so long, that a court of equity will, under the circumstances, refuse them the relief they ask? and the evidence repels such a conclusion. 1. They were all minors at the time of the sale in 1830, except one, who was married and whose husband is still living. They were all females and all married before they became of age. 2. They filed their bill in 1839 in Tennessee, and the court admitted the fraud, but refused relief against the securities, because the property was in Missouri, out of the jurisdiction of that court. (*Keeton v. Campbell*,

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2 Humph. 224.) They then sought relief in Missouri, and again mistook their remedy, as the court decided. (13 Mo. Rep. 347, and same case, 15 Mo. Rep. 136.) 3. The administrator removed the property from Tennessee, where they resided, to Missouri, where he could better conceal his fraud. 4. There was evidence of a declaration by Wm. Keeton that he had bid off the slaves at the sale for the benefit of the widow and heirs, and that he professed to retain possession for them.

Mr. *Nbell*, for respondent, argued the following points: I. The evidence established no fraud in fact or in law in the sale of the slaves by the administrator, and it was made under the order of a court of competent jurisdiction. II. If there was fraud, still the claim of the complainants is barred by limitation and lapse of time. 1. It may be admitted that express trusts, and such as are *intentionally created by the act of the parties*, are exempt from the operation of the laws of limitation, so long as the relation of trustee and *cestui que trust* continues to exist. In cases however of constructive trusts, resulting from the fraudulent conduct of the party against whom the trust is attempted to be set up and enforced, the statute of limitations runs. (3 Murphy, 583.) 2. The cases cited by the appellants do not sustain their position. The case of *Michaud v. Girod*, (4 Howard,) was decided upon its own peculiar circumstances. The plaintiffs lived in Europe and the fraud was perpetrated in Louisiana, and although they had long slept upon their rights, they did so without full knowledge of the facts. Besides, there was concealment on the part of the administrator. The other authorities cited by them were cases of direct trusts. 3. The disability of infancy, which some of the complainants were under at the time of the sale, expired more than five years before the filing of this bill. The fact of their subsequent marriage before becoming of age will not relieve them from the operation of the statute. Disabilities cannot be tacked. The fact that one of them was married, at the date of the sale, to her present husband, one of the complainants, is immaterial. Her husband was fully competent to

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act for her in regard to her personal property, and he was present at the sale. A recovery in this case would enure to his benefit. · III. Even if the statute of limitations is no bar, yet a court of equity will not relieve, under all the circumstances of this case, after so long an acquiescence in the sale, and after the death of the administrator, who alone was able to explain the whole transaction. (2 Dev. Eq. Rep. 167, a case directly in point. 1 Id. 58. Ib. 191.)

SCOTT, Judge, delivered the opinion of the court.

1. It cannot have escaped the observation of those whose attention has been called to the subject, that the application of the statute of limitations, in courts of equity, to matters of trust, is made difficult from the contrariety of opinion which prevails in relation to it. Whilst all admit that an express or direct trust is not subject to be barred by the statute, a difficulty is experienced in determining what trusts fall under the denomination of express or direct trusts, as well as in ascertaining the period of limitations to be applied after the character of the trust is determined.

All seem to admit that, when courts of law and equity have a concurrent jurisdiction over a subject, and an action in relation to it is barred at law, a defendant cannot be deprived of the protection of the statute, by converting him into a trustee and suing him in a court of equity. In such cases, the statute is equally available in both courts as a defence.

In the conflict of views, on the question as to what trusts are excluded from the operation of the statute of limitations, we may safely adopt the conclusion of Chancellor Kent, in the case of *Kane v. Bloodgood*, (7 Johns. Ch. Rep. 110,) who, after an able review of the cases on the subject, expresses the opinion that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity.

He says the trust must be a continuing one. There are cases, which maintain that a strict trustee must take care of the interest of his *cestui que trust*, and he is not permitted to do any thing adverse to it; that acts which, if done by a stranger, would be adverse, are not so in a trustee, from its being his duty to abstain from them; that it is at the option of the *cestui que trust*, to treat such acts as adverse or not.

But Chancellor Kent, in the case to which reference has been made, maintains that, if the trustee deny the right of his *cestui que trust* and assume absolute ownership, the remedy of the latter is confined to the period allowed for the recovery of legal estates at law; that so long as the trust is a subsisting one, and admitted by the acts and declarations of the parties, the statute does not affect it; but when such transactions take place between trustee and *cestui que trust* as would, in case of tenants in common, amount to an ouster of one of them by the other, a court of equity would not consider length of time of no consequence. There is no good reason why the statute of limitations should not apply to such a case, as well as to cases of constructive trusts, to cases of detected fraud, and to all other cases in which the statute is assumed as a rule of decision. In the case of *Boone v. Chiles*, (10 Pet. 223,) the court says that an express voluntary trust cannot be enforced, after its known disavowal for such time and under such circumstances as would make an adverse possession a bar; that time does not bar a direct trust, as between a trustee and *cestui que trust*, till it is disavowed. In the case of *Robinson v. Hook*, (4 Mason, 151,) Judge Story says: "When it is said that the statute of limitations does not apply to cases of trust, it is material to consider the sense in which that proposition is to be understood. In respect to trusts, which are strictly such and recognized and enforced in courts of equity only, such as express trusts created by the parties for particular purposes, the doctrine is in general true. So long as the relation of trustee and *cestui que trust* is admitted, in the case of express trusts, to exist between the parties, the very duties to be per-

formed by the trustee prohibit him in general from setting up such bar. Acts, which, done by a stranger, might be deemed adverse, when done by a trustee, admit of a very different interpretation. But even in cases of express trusts, if an open, public, adverse claim is set up by the trustee against his *cestui que trust*, and the trust itself is denied as any longer subsisting, there is much reason to hold that the bar ought to be admitted to arise from such period." Afterwards, in the case of *Baker against Whiting*, (3 Sum. 486,) the same Judge says: "The doctrine that no time is a bar to a trust, clearly established, is regularly true, when it is received with the proper accompanying limitations; that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act, as upon an asserted adverse title." In the case of *Pipher v. Lodge*, (4 S. & R. 315,) it was held that, though as a general rule, the vendor, before conveyance, is a trustee for the vendee, and while his possession can reasonably be reconciled with the existence of the trust, the statute of limitations has no operation; yet, if he disavows the trust, the vendee having notice will be barred by the statute of limitations of twenty-one years, such acts being evidence of a disseizin. It was thought analogous to the law of tenants in common. One tenant in common, who is in possession of the whole, while he does not deny the right of his co-tenant shall be presumed to hold as tenant in common, and the act of limitation will not attach; but when he denies the title of his partner, claims the whole exclusively, and will not suffer him to enter, the presumption of an ouster arises, and the statute takes effect. To the same effect is the case of *Walker v. Walker*, (16 S. & R. 384.) After a review of the cases on the subject, Angel, in his work on Limitations, 513, says: "Even in cases of direct and technical trusts, if the trustee should deny the right of his *cestui que trust*, and assume absolute ownership, the latter could not be allowed a remedy.

beyond the period limited for the recovery of legal estates at law."

In cases of resulting, implied and constructive trusts, when a party is to be constituted a trustee by a decree of a court of equity, founded on fraud, it is well settled as a rule of equity, that the statute of limitations and presumption from lapse of time will operate. With regard to the statute of limitations, it will run from the time that the facts are brought home to the knowledge of the party. He then has a cause of action, and there is no reason for placing him in any better situation than any other suitor. Having a cause and being fully aware of it, there is nothing to prevent the statute from running against him. The statute to be applied in such cases is determined by the nature of the claim. Lord Redesdale, in the case of *Bond v. Hopkins*, (1 Sch. & Lef. 429,) says: "If the equitable title be not sued on within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title, as would bar him, if his title were solely at law, he shall be barred in equity. As in suits relating to real estate, courts of equity adopt the limitation of twenty years, that being the period beyond which a writ of entry is barred, so in those relating to personalty, they are governed by the limitation prescribed for personal actions." Angel, 511, says: "It is perfectly clear that, whenever a person takes possession of property in his own name, and is afterwards, by matter of evidence or by construction of law, changed into a trustee, lapse of time may be pleaded in bar. This possession entitles him at least to the same protection as that of a direct trustee, who, to the plaintiff's knowledge, disavows the trust and holds adversely." (*Miller v. Mitchell*, 1 Bai. S. C. R. 437. *Buchan v. James' Adm'r*, Speer's Ch. Rep. (S. C.) 375.)

From the foregoing principles relating to the application of the statute of limitations in equity for the enforcement of

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trusts, which we have endeavored to show are established as law, it will follow that, in whatever light this suit is viewed, whether as one seeking to enforce an express or direct trust, or a constructive one, resulting from the proof of fraud in the person sought to be made a trustee, it is evident that the statute of limitation applies.

In this case, there is no evidence wanting to establish the fact that a great many years ago, William Keeton asserted an adverse title to the slaves in controversy. His assertion was open and notorious, accompanied with the possession of the property and claim of ownership. The fact is stated in the bill that a short time after the sale, Keeton held the slaves as his own property, and that they remained under his control until his death, and are now in the hands of his administrator. The sale took place in March, 1830, and this bill was filed in March, 1848.

2. The answer sets up the statute of limitations as a defence to the bill, and there is no charge in the bill of any coverture or infancy or any other matter which avoids it. The exceptions to the statute, not being in the pleadings, no evidence could be received in relation to them; for the evidence, to be admissible, must be founded on some allegation in the pleadings. The doctrine is now clearly established that, if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill, or, instead of replying, he must, according to the modern practice, amend his bill, if it contains no suitable allegation to meet the bar. (*Pratt v. Vattier*, 9 Pet. 416.)

3. But we will consider the cause as though the facts in avoidance of the bar of the statute were in the pleadings. If we are correct in what has been said before, this cause of action accrued between the years 1825 and 1835; consequently, under the eleventh section of the third article of the act concerning limitations, in the code of 1835, the limitation contained in the code of 1825 is that by which it is governed.

By the act of 1825, one entitled to bring any personal

action, if out of the United States, beyond seas, an infant or *feme covert* at the time the cause of action accrued, is allowed to bring his or her action within such time as such action is before limited after their respective disabilities are removed. It is now settled that the term "*beyond seas*," in the act of 1825, does not mean out of the limits of the state; consequently, if a person is absent from this state in one of the United States, he is not within the exception of the statute. (*Marvin v. Bates*, 13 Mo. Rep. 217. *Fackler v. Fackler*, 14 Mo. Rep. 481.)

4. Clarissa, the youngest child, was an infant at the time the cause of action accrued. She was born in November, 1822, and was of age in November, 1843. She was married in 1837 or '38. Now her marriage did not merge her disability of infancy, nor did it prolong her right to sue, as it did not exist at the time her cause of action accrued. It was a cumulative disability, and therefore not allowed. By the statute, she had five years within which to bring her action, after the disability of infancy was removed. Her husband's failure to sue, although he might have brought an action, did not affect her right to sue within the time allowed by the exception. (*Robertson v. Wardeman*, 2 Hill (S. C.) Rep. 324. Angel on Limitations, 206-7-8-9. *Butler v. Howe*, 13 Maine, 400. *Wood v. Aiken*, 1 Paige Chan. 616.) According to this, the statute had not run against Clarissa, at the time this suit was commenced in March, 1848. The five years would have been out in November following, and she would have been barred. Her two elder full sisters would be barred, as the five years would have expired as to them, from the removal of their disability of infancy, it being less than a year within the time of expiring as to a younger sister. It matters not when they were married, as they were single when the cause of action accrued, as we have seen that marriage, occurring after the cause of action has accrued, does not prolong the protection of the statute. As to the two sisters by the first wife, it does not appear when they were born, or when they were married. If they were both under age and married at the time of the accruing of the action,

then both disabilities must be removed before the statute will run against them. If they were adults and married, at the time of the accruing of the action, their coverture, so long as it continues, will prevent the running of the statute. Of course, the same marriage or coverture is meant, as existed at the time the cause of action accrued.

5. It thus appears that some of the plaintiffs are barred and some are not. What effect will this have? If it be true that, in the application of the statute of limitations, courts of equity are governed by analogy to its application in suits at law, then it would seem that, as at law, in all actions jointly instituted, unless all the plaintiffs are under disability, the operation of the statute is not arrested, a disability existing on the part of one of the plaintiffs will not prevent the running of the statute against all of them. The application of this rule in equity would seem to be less harsh than at law; for, in equity proceedings, if one plaintiff will not join, he may be made a defendant. In the case of *Riden and others v. Frion*, (3 Mur. (N. C.) Rep.) in an action of detinue for slaves descended to three heirs, it was held that the infancy of one of them did not prevent the running of the statute. The other heirs not being entitled to the protection of the statute, the suit was barred as to them, and being barred as to some, it was barred as to all. The case of *Perry v. Jackson*, (4 Term Rep. 516,) was on a bill of exchange by several plaintiffs. It was held that, though one of the parties was not barred by reason of his disability to sue, yet one being barred, all were barred. In *Marsteller v. McLean*, (7 Cr. 156,) which was an action for mesne profits, the same doctrine was maintained. In *Turner v. Debell*, (2 Mar. (Ky.) Rep. 384,) suit was brought by two executors, and it was held that the disability of one of them did not prevent the statute from running.

The same rule prevails in real actions, if the tenants unite in a joint demise. In such case, the disability of one of the joint tenants does not aid the others. If one is barred, all are barred. By making a separate demise, and suing for his own

interest, he who has been under a disability may recover his share. But if he sues jointly with others who are barred by the statute, he will not be protected. (*Roe v. Rowleston*, 2 Taun. 445.)

6. Then there are two objections to this suit. First, that the statute of limitations is set up in the answer as a defence, and there is nothing in the bill which avoids the effect of that bar; second, courts of equity, applying the statute of limitations, enforce it as it is enforced at law, and as at law a joint action being barred as to some of the plaintiffs, is barred as to all, some of the plaintiffs in this suit being excluded from the protection of the statute, all are excluded. As these objections may be obviated by amendments, and as a dismissal of the bill might enable the party to plead the statute of limitations against Clarissa, if not against others, the decree will be reversed and the cause remanded.

7. This course will render necessary an expression of our opinion as to the conduct of William Keeton in relation to the slaves entrusted to him as administrator. The facts established by the evidence abundantly show that the sale made by him was a feigned one; that he was guilty of a fraud, and converted his intestate's estate to his own use. He was poor and thriftless, unable to pay his debts before he became administrator. Suddenly he becomes rich and is, to all appearance, a man of wealth. This is not accounted for in any way. It does not appear that he was enriched from any other source, or by any other means. His apparent prosperity can only be ascribed to the possession of John Keeton's estate. Most if not all the witnesses who were present at the sale, inform us that William Keeton was the purchaser of most of the slaves. The bill of sale to Elizabeth Keeton seems to have been an after thought. It was dated in April, 1832, more than two years after the pretended sale, and within a few days thereafter, a bill of sale is executed by Elizabeth Keeton to William Keeton, reconveying the slaves. The bill of sale to E. Keeton is made to recite the falsehood that the slaves were delivered to her at the adminis-

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tration sale, at which it is pretended she bought them, when all the evidence shows that William Keeton always retained possession of them. It is recited therein, that it was made in satisfaction of alleged advancements of William Keeton to John Keeton's estate, amounting to the sum of \$2,691. Now the order of court under which the sale took place, recited that the debts against the estate, for the payment of which the sale was made, only amounted to the sum of one thousand dollars and upwards. If William Keeton had made advancements to the estate, why were they not passed upon and allowed before the sale and their payment provided for? The sale was also made to enable the administrator to make distribution of the slaves among the heirs. It would seem then, that this was a winding up of the estate. Is it not singular, then, that it should not appear until after this step that the estate was indebted to him for advancements, and that too, in an instrument signed by a confiding sister, who unfortunately found out too late that her confidence had been betrayed? The administration sale of the slaves was without notice of its terms. Against the usual course in such sales, it was made for cash, causing a diminished price for the slaves, and producing dissatisfaction among those attending it.

It is unnecessary to pursue this subject farther. Every circumstance is against the fair dealing of William Keeton, and there is nothing in the record to relieve his administration of John Keeton's estate from the imputation of fraud and mismanagement under which it rests and must rest.

The plaintiffs will have leave to amend, and the decree is reversed and remanded, with the concurrence of the other judges.

BIDAULT *et al.*, Respondents, *vs.* WALES & SONS, Appellants.

1. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them *at the time agreed upon*. He must, when he buys, intend *never* to pay for them, to prevent the title from passing; and this is a question for a jury.

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2. Although a vendor may avoid a sale as against the purchaser, yet this cannot be done when the rights of third parties have intervened. This exception however does not embrace creditors of the purchaser seizing the property by attachment or under execution, or taking it by assignment as a security for pre-existing debts.

Whether it would extend to the protection of the lien of a factor of the purchaser for a general balance, or a lien in relation to the specific property, left open.

Appeal from St. Louis Circuit Court.

This was an action by Bidault & Co. to recover sixteen hogsheads of sugar, or the value, consigned to defendants as the factors of one Whiting, who claimed the sugar under an alleged sale to him by the plaintiffs, which, as the latter insisted, did not pass the title, by reason of his fraud. The allegations of the original petition are stated in the opinion of the court when the cause was formerly here. (19 Mo. Rep. 36.) After it was remanded, the plaintiffs amended their petition, by stating that "Whiting purchased and received the possession of the sugar without any intention of paying for the same, and with the purpose of cheating and defrauding the plaintiffs out of their property." The defendants took issue upon this additional averment. They further alleged that when the sugar was consigned to them, Whiting was indebted to them, and that this indebtedness had not been paid, and that they had been summoned as garnishees in a suit against Whiting, brought by a party to whom he was indebted in a larger amount than the balance which would remain in their hands after payment of their demand. The cause was tried before a jury. There was evidence that the sugar was bought of plaintiffs in New Orleans on a credit of ten days by an agent of Whiting for him and under his instructions, and was shipped to defendants at St. Louis to be sold on his account; that he was insolvent at the time of giving the instructions, and at the time of the purchase, and was aware of his insolvency; that for some time previous he had been making purchases of sugar and with the proceeds paying for preceding purchases; that his agent had made a previous purchase of plaintiffs which had been paid for

with the proceeds of sugar subsequently bought of another party; that he was not in New Orleans at the time of the last purchase from plaintiffs, but arrived four or five days afterwards, and drew drafts against the sugar in favor of other parties, to whom he was indebted for previous purchases, for one third of the amount of his indebtedness to them respectively, and offered to give plaintiffs a draft for one third of the amount of his indebtedness to them, they granting an extension for the balance, which they refused to accept.

The defendants offered to show the state of accounts between them and Whiting when they received the sugar, but this evidence was excluded, and an exception taken. They also offered to read in evidence the judgment in the suit against Whiting and the proceedings against them as garnishees in that suit. This evidence was likewise excluded. All the instructions asked by the defendants were refused, and the court, of its own motion, gave one which is set out in the opinion of the court, under which there was a verdict for the plaintiffs. The defendants appealed.

Knox & Kellogg, for appellants. 1. The instruction given by the court is erroneous, as it asserts the doctrine that a man who does an honest act with a worthy motive is guilty of fraud because he was insolvent and knew of his inability to meet his engagements, and pay his debts as they matured. 2. The court erred in rejecting the evidence of the state of accounts between Whiting and the appellants.

Glover & Richardson, for respondents. 1. The principle is well established that if a vendee, at the time of a sale, knows of his inability to pay, and purchases on credit with the preconceived design not to pay, the title to the property does not pass. (*Bidault v. Wales*, 19 Mo. Rep. 37. *Earl of Bristol v. Wilsmore*, 1 Barn. & Cress. 520. *Noble v. Adams*, 7 Taunt. 59. 12 Pick. 312.) 2. The question of intent being one for the jury, this court will not look into the evidence, to see if it supports the verdict. 3. The evidence as to the state of accounts between the defendants and Whiting was properly ex-

cluded, because, if no title passed by the sale to Whiting, the defendants had no right to make their debt against Whiting out of plaintiffs' property. For the same reason, the judgment against Whiting and the garnishment of the defendants in that suit were immaterial. 4. The instruction given was more favorable to the defendants than the law required. It required the jury to find, not only that Whiting did not intend to pay when he made the purchase, but to find the further fact that the purchase was but a contrivance on his part to sustain his credit.

LEONARD, Judge, delivered the opinion of the court.

1. This judgment must be reversed on account of the instruction given to the jury as to the law of the case.

When it was here before (19 Mo. Rep. 36,) this court held in substance, that a purchaser did not acquire a valid title to property if he got it under the mere form of a purchase, made with a preconceived design of never paying for it; but that mere inability to pay, even if known to the purchaser at the time of the purchase and concealed from the seller, did not avoid the sale; and we think the law was correctly laid down; but however that may be, it was the judgment of this court, and must be submitted to as the law of the case.

The plaintiff amended by inserting an averment to the effect that the party "purchased and received the property without any intention of paying for the same, and with the purpose of cheating and defrauding the plaintiffs out of their property," and upon a jury trial the court instructed that "if Whiting (the purchaser) at the time of the purchase of the sugar in question, was in good or ordinary credit, on a sale of ten or twenty days, but in fact was *unable to pay at the time agreed upon between the parties*, and was aware of his inability *in this respect*, and the jury shall further find that he did not, at the time of said purchase, intend to meet *his engagements*, but that said purchase was but a contrivance on his part to sustain his

credit, the plaintiffs are entitled to a verdict; otherwise the jury will find for defendants."

Under this direction, the jury would of course find for the plaintiffs, if they thought the purchaser was unable to pay when he bought, and that he knew this and concealed it from the plaintiffs, and bought for the purpose of sustaining his own credit, and without any expectation or intention of meeting the payment on the day it fell due, although hoping and intending ultimately to pay.

And it has been argued here, that this instruction contains every element necessary to constitute a fraudulent purchase according to the law laid down upon the former occasion, and indeed that it even goes in favor of the purchaser beyond what we deemed to be the law, in directing the jury that they must also be satisfied that the purchase was but a contrivance on the part of the buyer to sustain his own credit. We think quite otherwise, and that the instruction was very unfortunately expressed, if the purpose of it were (as we must presume it was) to convey to the jury the rule of law prescribed here as applicable to the case.

There is a very broad line of distinction, both in morals and law, between the conduct of one who gets property into his possession with a preconceived design never to pay for it, under color of a formal sale induced by a sham promise to pay which the party never intends to comply with, and the conduct of a man deeply involved in debt, far perhaps beyond his means of payment, and who, struggling it may be, and frequently is, against all rational hope, to sustain his credit and maintain his position in business, buys property to-day, under a promise (which he can hardly hope and most probably does not intend to keep) to pay for it on short time, in order to raise money from day to day to meet immediate and more pressing demands. Yet, under this instruction, the jury may well have supposed, and no doubt did suppose, that the law made no distinction, but visited both classes of cases with the same legal consequences. The difference between not intending to pay on

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the day fixed by the contract and intending never to pay—between getting property for nothing, under the mere color of a purchase, and getting it upon a longer credit than was agreed upon by the parties, but with an expectation ultimately to pay, is entirely lost sight of, or rather indeed, as it seems to us, the jury are in effect instructed that there is no difference, and that it is enough in this particular to avoid the sale as a fraudulent purchase, that the purchaser was unable to pay “at the time agreed upon,” and aware of his inability “in this respect,” and did not intend to meet “his engagements” in point of time.

It was said before and is repeated now, that this is a question for a jury under proper instructions from the court. Although it may be improper in morals for one to buy property upon a promise to pay on a given day, when the party is conscious of his inability to meet his engagements at the time, and so may be said to buy with an intention not to meet his engagements, yet this is not, in point of law, such a sale as the vendor can avoid, and it was the duty of the court, in its directions to the jury, to have made the distinction in unmistakable language, and not to have employed general expressions, capable of being argued one way before the jury and another way before the court, and which the jury could construe to mean one thing or the other, according to the caprice of the moment, or their own peculiar views of the conduct of the parties in other respects.

We have been referred by the counsel for the plaintiffs to the case of *Noble v. Adams*, (7 Taunt. 59,) as a case similar in its circumstances to the present one. That case was tried before the Chief Justice of the Common Pleas, and the instructions he gave the jury were approved of by the whole court, upon a motion for a new trial, and an examination of that ruling will show that we are justified in the opinion of that court in all we have said here.

The purchaser there, a trader in London, being in embarrassed circumstances, went down to Glasgow and bought the

goods, paying for them with his own acceptance, and with bills of a third person whom he knew to be insolvent, and the suit was by the purchaser against a wharfinger in London who defended for the benefit of the former owner, and the question made upon the trial was, whether the plaintiff purchased the goods under such circumstances as vitiated the sale for fraud. The Chief Justice directed the jury that "If they thought the purchaser went to Scotland, having formed a deliberate design to put off bad bills for valuable merchandise, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into immediate bankruptcy, or to pass them over to a particularly favored creditor, the purchaser was guilty of a fraud, and the sale would not change the property; but if the purchaser only meant to give these bills, and himself by these bills, more credit than they deserved, and intended to continue to carry on his business and to try to pay for the goods at some time or other, if he could, that was not such a fraud as would vitiate the sale."

Here, the distinction to which we have referred is broadly marked, and the attention of the jury called directly to it, so that they tried the case with a clear understanding of the rule of law they were bound to apply to it.

With the facts of the case now before us, we have nothing to do. Our duty is discharged when we see that the court trying the cause has properly instructed the jury as to the law that ought to govern them in deciding it. The responsibility of rightly determining the facts is upon the court and jury below.

2. The other point made in the cause may be disposed of in a few words. This property appears to be in the hands of the defendants as Whiting's factors, and they allege that when it came there, a large balance was due to them on general account from their principal, and that they have since been summoned upon an execution against their principal, as garnishees, in respect to this property. When it is said, in the case of a fraudulent purchase, that the property is not changed, it is to be understood that, although the party injured may avoid the sale

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against the fraudulent purchaser, this cannot be done when the rights of third persons have intervened. This exception, however, does not embrace the general creditors of the purchaser seizing the property by attachment or execution, or taking it by assignment as a security for pre-existing debts.

It may extend, however, to the protection of a factor's lien, even for a general balance, and it would seem, ought certainly to protect any lien he may have in relation to the specific property; and whether the proceedings in the garnishment had progressed so far as to fix any personal liability upon him in respect to the attached property, is not disclosed; and we leave these questions for future consideration, if they shall arise in the cause. The judgment is reversed, and the cause remanded for further proceedings.

CUNNINGHAM, Plaintiff in Error, *vs.* ASHBROOK & OTHERS,
Defendants in Error.

1. As a general rule, goods existing separately and ready for immediate delivery, are the only proper subjects of a common law sale, which is, strictly speaking, a transaction operating as a present transfer of title, and does not include executory contracts for the sale and delivery of goods to be separated from a larger mass, or to be afterwards procured or manufactured for the buyer.
2. To constitute a delivery, within the meaning of the statute of frauds, there must be not only a change of the actual possession, but a change of the civil possession, which is a holding of the thing, with the design of keeping it as owner; and this is a question of fact for a jury.
3. The principle that, in a sale of goods, no title passes, while any act, such as counting, weighing or measuring, remains to be done by the seller, is only applicable when such act is necessary to separate the goods from a larger mass; and does not apply to the sale upon fixed terms, by weight to be subsequently ascertained, of goods already separated, in which case the title passes by delivery; and as a consequence, the loss by a destruction of the goods, after they are delivered and before they are weighed, will fall upon the buyer.
4. Although there is no sale until the price is settled, yet it is settled, within the meaning of this rule, where the terms are so fixed that the sum to be paid can be ascertained by weighing, without further reference to the parties themselves.

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5. As in the sale of an entire drove of hogs, upon fixed terms, by net weight, a jury would be at liberty to infer delivery from change of possession, an instruction which would be understood to assert, as a matter of law, that this inference would be repelled by the fact that the hogs were to be subsequently weighed, is erroneous.

Error to St. Louis Court of Common Pleas.

This was an action to recover the price of a drove of hogs, alleged in the petition and denied in the answer to have been sold and delivered.

At the trial before a jury, it appeared in evidence that the defendants were engaged in the business of slaughtering and packing hogs for themselves, and also slaughtering for other packers. They had an arrangement with McAllister and also with Whitaker, who were packers, that each should have one third of all the hogs slaughtered by them (they to attend to the buying, and do the slaughtering,) for the sake of the offal. There was an agent employed to buy, who testified that he bought sometimes for the defendants, and sometimes for McAllister and Whitaker, but principally for the defendants. This agent engaged all the plaintiff's hogs, 148 in number, at \$4 15 per hundred, net weight, to be delivered at the slaughter house of the defendants, and killed and weighed by the buyer. He did not state for whom he was buying, but the seller supposed it was for the defendants, as he was known to be their agent. The agent testified that when he bought the hogs, he did not know whether the defendants, McAllister or Whitaker would get them. The hogs were taken to the slaughter house of the defendants the same day, and the next morning killed. The defendants then notified the seller to call next day at the packing house of McAllister, who would take the hogs, and see them weighed and get his pay. That night, however, the slaughter house burned down, and the hogs were destroyed. It was in evidence that it was customary for hogs to be weighed at the packing house, in the presence of the seller, who then received his pay from the packer; and one

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witness undertook to testify that, *by the custom*, the ownership of the seller continued until the hogs were weighed.

The Court of Common Pleas gave the following instruction: "If the hogs were sold by net weight, to be ascertained by weighing the hogs after they were slaughtered and cleaned, and not to be paid for until so weighed, and the hogs were destroyed by an accidental fire before they were weighed, then the loss falls upon the seller, unless he shows that the parties intended the sale to be absolute and complete before the weighing."

The plaintiffs submitted to a nonsuit, and afterwards sued out this writ of error.

Glover & Richardson, (with whom was *D. C. Woods*), for plaintiff in error. The instruction given was erroneous. It attributes an undue importance to the matter of weighing, which is only essential when it is necessary to the act of delivery. So *Kent* says, (2 vol. 496,) "if the goods be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller *until the specific property be separated and identified*." The reason of this is plain. If ten hogs are sold out of a lot of 100, the particular ten sold must be counted out and separated before they can be delivered. But we maintain that 148 hogs in a pen are a lot of goods and chattels, designated, set apart, separated, identified, and certain, so as to be the subject of a complete sale, and in a deliverable condition; and having been delivered to the defendants according to the contract, the stipulation to weigh was intended, not to suspend the passing of the title, but only to enable the parties to settle their accounts. (*Damon v. Osborn*, 1 Pick. 476. *Parks v. Hall*, 2 Pick. 212. 6 Pick. 280. 12 Pick. 76. 4 Pick. 516. 13 Pick. 175. 6 Watts & Serg. 357. 20 Pick. 280.) The instruction of the court ought to have rested the evidence of title upon the question of *delivery* made by the pleadings. The error consisted in supposing that the title ever passes by an act of weighing as such. Again, the instruction was erroneous because the defendants had dealt with the hogs as their own. (2 *Kent*, 501.) Again, it was erroneous, because, at

the time of the destruction of the property, the defendants were not in a condition to object either to the quantity or quality of the goods. (2 Kent, 495. 14 Maine, 502. 7 Cow. 86.)

J. A. Kasson, for defendants in error. It is contended that the instruction was correct. The hogs being sold by net weight and not to be paid for till this was ascertained by weighing, how can the contrary be contended? If some act remains to be done, in order to ascertain the quantity, or quality or or price, until this is done, the property remains at the risk of the vendor. Thus if weighing remains, (*Hanson v. Meyer*, 6 East, 625,) or the contents of bales are to be counted, (2 Camp. 240,) or cash sale, and price not paid, (3 Barn. & Ald. 680.) In this case, delivery, acceptance and price were all to be by net weight. (See further, 2 B. & Cress. 511. 3 B. & Ald. 325. 5 Taunt. 621-2 and note. 14 Wend. 35-6. 20 Pick. 283-4.) It is to be remembered that the thing sold was not the hog, but the pork. Hence, the slaughterers were the bailees of the sellers for killing and reducing the hog to the condition in which it was to be delivered, to-wit, *net weight*, after being cleaned. The plaintiff seeks to recover in the face of a stipulation that the price was not to be paid until the hogs were weighed.

LEONARD, Judge, delivered the opinion of the court.

The only things essential to a valid sale of personal property at common law were, a proper subject, a price, and the consent of the contracting parties, and when these concurred, the sale was complete, and the title passed without any thing more. (2 Black. Com. 447. *Bloxom v. Sanders*, 4 Barn. & Cres. 941.) The term sale, however, in its largest sense, may include every agreement for the transferring of ownership, whether immediate or to be completed afterwards, and goods, in reference to the disposition of them by sale, may be considered as existing separately and ready for immediate delivery, or as a part of a larger mass from which they must be separated by counting, weighing or measuring, or as goods to be

hereafter procured and supplied to the buyer, or to be manufactured for his use. Goods of the first sort are the only proper subjects of a common law sale, which is strictly a transaction operating as a present transfer of ownership, and does not include executory contracts for the future sale and delivery of personal property, although there are some apparently anomalous cases in our books in which transactions in reference to goods to be separated from a mass seem to have been treated, where there had been a constructive delivery, as valid sales, producing a present change of property.

The general rule, however, is otherwise, and all the different sorts of goods to which we have referred, except the first, are, under our law, the proper subjects only of executory agreements—contracts for the future sale and delivery of them.

The Roman law, however, it is said, dealt differently with this subject. In that system of jurisprudence (Bell on Contract of Sale, 9,) "a sale was not an immediate transmutation of property, but a contract of mutual and personal engagements for the transference of the thing on the one hand and the payment of the price on the other, without regard to the time of performance on either part, that being left to be regulated by the agreement of the parties, the seller being bound to deliver the thing in property to the buyer at the time agreed on, and the buyer to pay the price in the manner settled between them. The distinction was carefully observed between the direct right of property (*jus in re*) conferred by delivery, and the indirect right (*jus ad rem*) to demand of the seller delivery of the thing sold. There thus arose out of the contract the double relation of debtor and creditor, as to the thing sold and the price to be paid for it. Corresponding with these relations, two actions were given, both personal and direct; one for the thing sold, the other for the price due. The claim for the price being absolute on delivery or tender of the thing and the demand for the thing conditional, provided it had not in the meantime perished without fault of the seller." Thus it is seen, a Roman sale was applicable to all the possible circumstances in

which goods to be transferred could be found, and the respective engagements of buyer and seller (under such a transaction,) were specifically enforced by the appropriate actions.

Although at common law consent alone was sufficient to constitute a valid sale, the statute of frauds has now intervened, and other formalities are prescribed, which must be observed, or what was before a valid transfer of property is now of no validity. The statute, beginning where the common law stopped, requires some one of these solemnities to be added to the transaction before it shall be considered as complete, so as to effect a change of ownership; and the matter here relied upon, as the statute evidence of the completion of the contract, was the change of possession. This provision of the statute implies, it is said, a delivery of the thing sold on the part of the debtor, and an acceptance of it by the buyer, with an intention on the one side to part with, and on the other to accept the ownership of it; and it is not enough that the mere natural, actual, corporeal possession should be changed, but there must be a change of the civil possession, which is a holding of the thing with the design of keeping it as owner; and this brings us to an examination of the instruction complained of, and which resulted in nonsuiting the plaintiff.

The proof given shows (or, at least, conduces to show, which, for the present purpose, is the same thing,) that the thing sold had been delivered in point of fact to the buyer, and the true question in the cause, (indeed the only one that could be raised,) was, whether this change of actual possession was also a change of the civil possession; or, in other words, whether the hogs were delivered and received by the parties respectively, with the intention of changing the ownership. If the facts were so, the sale was perfect, the title passed, and the loss fell upon the new owner.

It is to be remarked that this is the sale of a specific commodity, the whole drove, and not of a part, to be ascertained by counting out the required number, and therefore, the title passed as soon as the bargain was completed by the delive-

ry. It was not a transaction in relation to the sale of part of a mass, which could not take effect as a present sale, immediately changing the property, until the separation was actually made; and it is possible some confusion may have arisen here by not clearly distinguishing between the sale of a specific commodity, clearly separated and distinguished from all others, as a specific drove of stock, and of an indefinite commodity, as a hundred barrels of corn out of the party's crib, or a hundred mules out of his drove, when the seller is bound to separate and identify the particular part sold, before it can pass in property to the purchaser.

Nor is there any objection to the validity of this transaction as a present sale, growing out of the supposed uncertainty as to the price. Although there is no sale until the price is settled between the parties, yet it is settled, within the meaning of this rule, when the terms of it are so fixed that the sum to be paid can be ascertained without further reference to the parties themselves; and, indeed, by the common law, the price is fixed within this rule, even when it appears that the parties have agreed that it shall be the reasonable worth of the thing sold, leaving it to the tribunals to ascertain the amount, if they cannot agree upon it themselves. (Bell on Sales, 18-20. *Accbol v. Levy*, 10 Bing. 382.)

This, then, was a present agreement between these parties for the sale of a specific commodity for a price settled between them, so as to be capable of future ascertainment, without further reference to themselves, and, we repeat, immediately passed the title to the buyer, if the ceremony of delivery required by the statute of frauds was complied with, and there having been a delivery in fact, the whole question was, as before remarked, with what intention that delivery was made, whether merely that the hogs might be weighed, neither party being bound in the mean time by what had passed between them, or as the formal completion of the bargain to bind the parties and vest the ownership in the purchaser.

We come now to an examination of the instruction complained

of, the substance of which is, that if the hogs were sold by net weight, to be ascertained by weighing after they were slaughtered and cleaned, then the presumption that the sale was completed by the delivery is met and repelled, and the loss falls on the plaintiff, as owner, unless he shows that the parties intended the sale to be complete upon the delivery. The jury would, no doubt, have so understood the direction, when they came to apply it to the case, and such, too, we suppose, was the meaning of the court; but we do not concur in this view of the law. Certainly, this circumstance was proper for the jury upon the question of the intention of the parties in changing the actual possession, and might have afforded a very proper topic of comment to counsel, in arguing the question of fact before them; but we do not think any well considered case has gone the length of declaring that it changed the strong natural presumption to be derived from the actual delivery of the property, and imposed upon the other party the necessity of showing that "the parties intended the sale to be absolute and complete before the weighing," and we feel well assured that there is no principle upon which this position can be maintained. We find it frequently repeated in the books, that when any thing remains to be done by the seller, such as counting, weighing or measuring, the title does not pass; and this is certainly correct, when this operation is necessary in order to separate the goods from a larger mass, of which they are part; but that is not this case, and we think that by keeping the distinction between a specific and an indefinite commodity in view, most of the cases upon this subject can be explained, and their apparent conflict reconciled. It is also certainly true that, in determining the question as to the purpose of the parties in changing the actual possession, the fact that the price is to be subsequently ascertained by reference to the net weight, and then paid, is proper to go to the jury; but possession is so much of the essence of property, as it is that alone which enables us to enjoy a thing as property, and the natural connection between property and possession, especially in movables, is so strong, that the

presumption arising from a change of actual possession, that it was intended also as a change of the property, is not, in our view, overcome, as a matter of law, by the fact here relied upon, that the thing bargained for was to be paid for by weight, to be ascertained after the delivery.

We shall content ourselves by a reference to a few cases which we consider directly in point, in support of the position we have taken. *Scott v. Wills*, (6 Watts & Serg. 368,) was a case of the sale of a raft of lumber at twelve dollars per thousand feet, to be ascertained by measurement. There had been a delivery, and the raft being lost by a freshet, the question was, whether the property passed so as to cast the loss upon the buyer. The court below instructed the jury that "parties may make a sale of goods so as to pass the property by the actual delivery thereof, without first fixing the quantity upon which the price is to be computed," and the Supreme Court approved of the direction, Judge Gibson remarking, "that a sale is imperfect only when it is left open for the addition of terms necessary to complete it, or where it is defective in some indispensable ingredient, which cannot be supplied from extrinsic sources. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated."

Macomber v. Parker, (13 Pick. Rep. 182,) was a sale of a quantity of brick in a kiln at a certain rate per thousand, to be ascertained by counting, and the court, in delivering its opinion says: "It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. Taking the whole of Hunting's testimony together, this we think is the reasonable inference to be drawn from it. If the bricks had been actually delivered, there could have been no question that the sale would have been complete, notwithstanding the bricks were to be afterwards counted. The general principle is, that when an operation of weight, measure-

ment, counting or the like, remains to be performed in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete, until such operation is performed. (Brown on Sales, 44.) But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position."

The remarks of the same court in *Riddle v. Varnum*, (20 Pick. 283-4,) to which we have been referred by the counsel for the respondents are not intended to conflict with what had been previously determined, but expressly affirm that decision.

It is true the court say that "the party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the sale agreed upon." And of this there can be no doubt, but yet that is a matter for the jury, and it is not intimated in this case that when there is an actual delivery, the jury cannot be allowed to infer such intention without some additional evidence.

These questions generally arise when the thing sold has perished, and the contest is upon whom the loss shall fall, and it may not be improper here to remark that, notwithstanding the marked difference between a Roman and a common law sale, in other particulars, when a loss occurs, it falls upon the same person under either system. Under our law, the maxim is that the owner bears the loss, a rule, it would seem, of universal application, *res perit domino*. Under the Roman law, the debtor of a specific thing was not answerable for its loss, when it perished in his hands without fault, and when there had been a purchase of a specific commodity, although the property was

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not changed until delivery, the seller, by the bargain, became debtor to the buyer of the particular thing bought, and so not liable if it perished without fault.

We repeat what we have before said, it is a question for the jury. If the delivery were for the purpose of passing the property, it had that effect, although the price was to be afterwards ascertained and paid according to the net weight, and there is no rule of law that, under such circumstances, the presumption arising from the delivery is met and repelled, and that other evidence becomes necessary in order to make out a *prima facie* case of a present sale. The seller has a right, notwithstanding the bargain, to retain his property till he is paid, unless he agrees to allow the purchaser a credit (the bargain for an immediate transfer of property implying a present payment of the price,) and hence, when there is no understanding as to the time of payment other than what is implied in the postponement of it until the quantity of the thing sold is ascertained in the manner indicated in the contract, this circumstance is certainly entitled to consideration with the jury, in determining the character of the delivery, which, if intended to pass the thing in property, deprives the seller of his security upon it for the price, at the same time that it throws upon the buyer the future risk. The judgment is reversed, and the cause remanded.

HOUGHTALING, Plaintiff in Error, vs. BALL & CHAPIN, Defendants in Error.

1. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds.

Error to St. Louis Circuit Court.

This was an action brought to recover the price of wheat, alleged in the petition to have been sold and delivered at Chicago, Illinois, to be paid for upon its arrival in St. Louis.

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The case was once before in this court. (19 Mo. Rep. 84.) At the trial before a jury, there was evidence tending to show that the defendants contracted with the plaintiff at Chicago for the purchase of about 2,900 bushels of wheat, at a stipulated price, to be paid upon its arrival in St. Louis, to which place, as appeared, the plaintiff had previously made a bargain with G. W. Shepard, a carrier, to ship it. After making the purchase, one of the defendants went and made arrangements with Shepard about the shipping. There was an understanding between them as to when and on what boat the wheat was to be shipped. The defendants were to furnish sacks at Lasalle to lighten the boat, on account of the low water. The freight was to be paid by the plaintiff. The wheat was shipped at Chicago at the time agreed upon, consigned to Matteson & Preston, St. Louis, for *Ball & Chapin*. Other wheat bought by defendants was shipped at the same time, and some portions of the two lots were mixed together. Matteson & Preston were instructed to deliver the wheat upon payment of the stipulated price. By reason of the failure of the defendants to furnish sacks at Lasalle, the wheat was delayed, and when it reached St. Louis, they refused to receive it. It was sold, and the proceeds applied upon the draft drawn against it. This suit is brought for the balance of the price. At the trial, the plaintiff asked leave to amend his petition by striking out the word "delivered," which was refused.

The following instruction was given at the instance of the defendant:

"If the jury shall find from the evidence that G. W. Shepard had possession of the wheat, and shipped the same to St. Louis to Matteson & Preston, to be delivered by them to the said defendants when said defendants should pay therefor one dollar and five cents per bushel, and that said Matteson & Preston never delivered said wheat to said defendants, they will find for the defendants."

Several instructions asked by the plaintiff were refused. There was a verdict for the defendants.

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Mr. *Kasson*, for appellant, cited 12 Ad. & Ell. 634. Story on Sales, §277. 2 Kent's Comm. 499. 19 Mo. Rep. 84. 3 P. W'ms, 185. 1 Atk. 248. Cowp. 294. 8 D. & E. 330. 1 J. R. 215. 2 Camp. 36. 1 H. Black. 363-4. 2 Camp. 639. 7 East, 558. 3 J. R. 40. 3 J. R. 420.

Knox & Kellogg, for respondents, that there was no delivery, cited Story on Sales, §266-7-8-9-80. 5 Wendell, 139. 1 Comst. 261. 6 Geo. 555. 4 Cushing, 497. 12 Barbour, 570. 1 Dow. & Ryl. 128. 2 H. Black. 316. Smith on Contracts, 428; that the contract was within the statute of frauds, 10 Bing. Rep. 384. Story on Contracts, §276. *Leroux v. Brown*, 74 Eng. Com. Law Rep. 801.

SCOTT, Judge, delivered the opinion of the court.

This case is here a second time, and on the same question that was determined when it was here before. The real question is one of fact, and the aim of the plaintiff is, to have that fact tried by a jury, viz: whether the contract set out in the petition was not so completed in the state of Illinois by a delivery of the wheat, as to avoid the objection to it arising from the statute of frauds, as it does not appear from the record that there is any statute in that state which affects the contract stated in the plaintiff's petition.

When this case was formerly here, we expressed the opinion that there was such evidence in the record as would warrant the court in submitting this view of it to the consideration of the jury. If the point of the instruction given for the defendant (and it was the only one given,) does not involve the statute of frauds, it is not easy to see its application to the case. On any other supposition, it would be clearly erroneous, as it would make the refusal of the defendants to receive the wheat from their own agent fatal to the plaintiff's action, although the contract had been long before completed on their part.

Without determining whether the case of *Leroux v. Brown*, (74 Eng. C. L. Rep. 801,) would be recognized as law here, it is sufficient to say in relation to it, that it is founded on the

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fourth section of the English statute of frauds, which enacts, "*that no action shall be brought,*" &c. These words are made to control the judgment rendered in that suit. But the contract sued on here is not under the fourth section of the English statute, nor under the fifth section of our law, which corresponds with the fourth section of the English statute. But the action is under the sixth section of our statute, which corresponds with the seventeenth section of the English statute. The words of these corresponding sections are different from those of the fourth, in the English, and the fifth section in the Missouri statute. They are, "*that no contract shall be good,*" &c. So they leave application for the rule of law that a contract, valid at the place where made, shall be valid everywhere, except when it contravenes the policy, or is in derogation of the rights of the country where it is sought to be enforced. In the case referred to, it was held that a contract made in France, which was not to be performed within one year, came within the words of the fourth section of the statute of frauds, which declares that "no action shall be brought upon a contract not to be performed within one year;" that these words relate to the procedure, to the *lex fori*, and are tantamount to a prohibition to entertain jurisdiction of suits on such contracts, wherever they may be made; that they operate on the suit like the statute of limitations; that, though the contract be good by the law of France, yet, inasmuch as the act forbids a suit upon such contract, no action can be maintained upon it. But at the same time, the judges say that a suit might be maintained on a contract void under the seventeenth section of the act, because that section does not prohibit the entertaining jurisdiction of actions on such contracts, but merely declares that the contract shall not be good; that, though not good by the English law, yet, being good in the country where made, it will be enforced.

The plaintiff's instructions should be in the language of the contract, as stated in his petition. The words of the first instruction, *delivered to a common carrier designated by the*

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defendants, do not state the delivery as it is stated in the petition. Such a delivery may or may not be a delivery to the defendants, according to circumstances.

The court should instruct the jury on the case as now made, that if the contract stated in the plaintiff's petition is proved, they should find for him.

We do not see that the plaintiff was prejudiced by the refusal of the court to allow the amendment prayed for.

As to the law of delivery, and what constitutes it, no question as yet has been made concerning it. It can only come up, when the court below will let the plaintiff go before the jury on his contract as alleged; it will then be declared by instructions, as arising from the facts in the case. Until the law has thus been given to the jury, we do not consider ourselves warranted in declaring that a plaintiff cannot recover.

The other judges concurring, the judgment will be reversed, and the cause remanded.

BARTH, Respondent, *vs.* MERRITT, Appellant.

1. A case where the supreme court refused to reverse a judgment for excessive damages.

Appeal from St. Louis Circuit Court.

E. Casselberry, for appellant.

Blennerhassett & Shreve, for respondent.

RYLAND, Judge. This was a suit for assaulting and beating the plaintiff. The jury found the defendant guilty, and assessed the plaintiff's damages at the sum of \$200.

Plaintiff moved for a new trial, because the damages were excessive. This motion being overruled, he brings the case here. The judgment below must be affirmed. This court cannot see that the damages in this case are so excessive as to

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have made it error in the court below to have refused to set aside the verdict and grant a new trial. (*Woodson v. Scott*, ante, p. 272.) The other judges concurring, the judgment is affirmed.

BUSCH & WEISSMANN, Appellants, vs. DIEPENBROCK, Respondent.

1. In a suit commenced before a justice, an account was filed, the first item of which was "balance from 1851, \$97 90." *Held*, the generality of this item was no sufficient ground for dismissing the suit in the appellate court.

Appeal from St. Louis Law Commissioner's Court.

Action upon an account, begun before a justice, (where there was a judgment for the defendant upon a trial, a motion to dismiss having previously been overruled,) and appealed to the law commissioner's court, where, on defendant's motion, the suit was dismissed on account of the insufficiency of the account filed. The first item in the account was, as stated, "balance from 1851, \$97 90." The other items were specific, making the whole amount of the account \$196 85, upon which there was a credit of \$148 75, leaving the balance sued for \$48 10. The plaintiffs appealed.

Cline & Jamison, for appellants.

Hart & Jecko, for respondent.

RYLAND, Judge, delivered the opinion of the court.

There was no ground, as appears by the transcript of the record, for sustaining this motion by the law commissioner. The plaintiffs had filed their account before the justice.

From the brief of the defendant's counsel, the objection taken was to the generality of the first item of the plaintiff's account. This item is thus stated: "Balance from 1851, \$97 90." The account then continues, with proper dates and items, containing a long list, and footing up with \$196 85, giv-

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ing also a list of credits amounting to \$148 75, leaving a balance due plaintiffs of \$48 10.

1. In the opinion of this court, this general item of "\$97 90, balance of account from 1851," was no sufficient ground to authorize the court to dismiss this suit, more especially after there had been a trial in the justice's court. If the item was too general to be understood by the defendant, his remedy was to move the court to compel the plaintiffs to furnish the items from the account of the year 1851, not to dismiss. His motion for a more particular account might have furnished him with all he wanted, or with all he had a right to require. The law commissioner should not have dismissed because a more particular account was not filed.

The legislation of our state, for many years past, has a strong tendency to do away with formal objections and technical defects in our judicial proceedings. It has been to this court a matter of surprise, of regret, to observe the great facility with which technical and mere formal objections have found a hearing in our inferior courts. How much better for the courts and the parties, that the causes be determined as speedily as possible, as right and justice may require, with as little regard to mere formal defects as the law will allow.

The judgment of the law commissioner is reversed, and the cause remanded ; the other judges concurring.

HELWEG, Plaintiff in Error, vs. HEITCAMP, Defendant in Error.

1. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first.

Error to St. Louis Circuit Court.

C. Gibson, for plaintiff in error, submitted the case upon the record.

J. R. & R. T. Barret, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The property in this case was incumbered by three deeds of trust regularly made and recorded in succession, in order to secure the payment of three distinct debts.

The trustee in the second deed advertised and sold the property, and there remained in his hands, after payment of the debt for which he was acting as trustee, some two or three hundred dollars surplus.

This action is brought to recover from the trustee this surplus fund, that it may be applied to the extinguishment, as far as it goes, of the debt mentioned and secured by the third deed of trust; and the only question is, how shall the surplus be applied, to the payment of the debt mentioned in the first deed of trust, or to the payment of the debt in the last or third deed of trust? The court below decided that the money must be paid over on the debt secured by the first deed. The plaintiff excepted to that decision, and brings the case here by writ of error.

1. This court is of the opinion that the surplus money in the hands of the trustee must be paid over to the plaintiff on the debt secured by the third deed. The sale of the property, under and by virtue of the second deed of trust, did not exonerate the property from the lien theretofore on it by virtue of the first or oldest deed of trust; it was sold liable to that debt, and the parties interested can still pursue it for that debt, so far as the facts appear from the record now before us.

The surplus, therefore, must be applied, after payment of the debt and cost of sale by trustee under the second deed of trust, towards the payment of the debt mentioned and secured by the last deed of trust, the creditor in the first deed being left to his remedy.

It cannot be pretended that the sale of the property under the junior lien extinguishes a prior lien in full existence at the date of the sale. It must be taken, then, for granted that the purchaser had this prior lien in his mind, and was willing to give,

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in addition to the amount of that lien, the amount of his present bid. The judgment of the court below is reversed, and the cause remanded for further proceedings; the other judges concurring.

SCHNEIDER, Appellant, *vs.* SCHIFFMAN, Respondent.

1. A party who puts his name upon the back of a negotiable note, to which, at the time, he is not a party, is *prima facie* liable as maker; and although, as between parties entitled to look into the real transaction, it may be shown that he signed as endorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice and for value.

Appeal from St. Louis Court of Common Pleas.

Action upon a note negotiable under the statute, given by Mochel, payable to Philip Burg or order, and by Burg endorsed to the plaintiff before maturity. The name of the defendant, Schiffman, was written upon the back of the note prior to the endorsement. Evidence was offered that he put his name on the note as endorser, and the court below found such to be the fact, and declared that the plaintiff could not recover against him, though it was further found that the plaintiff, when he took the note, had no knowledge of the character in which Schiffman signed it, other than could be gathered from the position of his name.

Hill, Grover & Hill, for appellant.

T. C. Reynolds, for respondent.

LEONARD, Judge, delivered the opinion of the court.

It is the settled doctrine of this court (*Powell v. Thomas*, 7 Mo. Rep. 440; *Lewis & Brothers v. Harvey*, 18 Mo. Rep. 74,) and cannot now be disturbed, that a party putting his name on the back of a negotiable note to which, at the time, he is not a party, either as maker or payee, is liable *prima facie* as maker; but that, as between parties entitled to look into the

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real transaction that resulted in his signature, it may be shown that he signed as endorser, and so incurred a conditional liability only. The question in the present case is, whether this may also be shown against a party who took the note before it was due, in the usual course of business, and for value, and without notice; and we are of opinion that it cannot, and that such a decision would be contrary to the principles and policy of the law in relation to negotiable paper, and generally result in throwing the loss from the party who occasioned it by his own act, upon a stranger, who relied upon what he found upon the note.

Negotiable paper, it is said, carries its own history upon its face, so that nothing can be alleged against it, while it continues in circulation undishonored, as against an innocent purchaser, other than what is there apparent. This defendant has placed his name upon the note in such position as, under our law, to impose upon himself the obligations of a maker, and he is irrevocably bound as such to all who take the note for value and without notice, upon the faith of what they find upon it, although it is otherwise with reference to those who are bound by the real transaction between the parties. It is no answer to this to say that it was the duty of the holder, when he saw the position of the defendant's name upon the note, to have enquired into the matter and satisfied himself before he took it, whether the party was to be considered chargeable as maker, or only as endorser. The policy of the law, in reference to negotiable paper, requires that it shall tell its own story, and have effect in the hands of innocent holders for value, according to what appears upon it. The result is, the judgment must be reversed, and the facts found by the court being such as, under the pleadings, show that the defendant is liable to this plaintiff for the amount of the note, this court, proceeding to render such judgment as ought to have been given below, judgment for the amount of the note and interest, with costs, will be entered here, instead of remanding the cause.

Wheeler v. Barret.

WHEELER, Defendant in Error, vs. BARRET, Plaintiff in Error.

1. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (Scorr, J., dissenting.)

Error to St. Louis Court of Common Pleas.

This was a proceeding instituted by Wheeler to restrain the collection of a note, and to compel the holder to deliver the same up to be cancelled. The facts appear in the opinion of the court.

A. Buckner, for plaintiff in error, insisted that Barber was to be regarded merely as Wheeler's agent for negotiating the note, and so the maxim that, of two innocent parties, he whose act has been the cause of the loss must bear it, was applicable.

Krum & Harding, for defendant in error. 1. The note in question, being overdue when it was transferred to Barret, was taken by him subject to all defences and equities connected with it. (Story on Prom. Notes, §178. 15 Mo. Rep. 399. 3 D. & E. 80. 2 Caines, 369. 5 Pick. 312. 5 N. H. 159.) 2. The rights and liabilities of the parties are not changed by Barber's agency, which ceased when the note to Smith, or at farthest, when the note in question became due.

RYLAND, Judge, delivered the opinion of the court.

From the statement agreed upon by the parties in this case, the question here is, upon whom shall the loss fall, on Wheeler or Barret? It seems that Wheeler owed Solomon Smith a sum of money, \$1200, which was to be paid on the 2d of June, 1850. The payment was secured by deed of trust on real estate of Wheeler. On the 15th of March, 1850, Wheeler made and delivered to R. Barber his negotiable promissory note for \$1875, payable twelve months after date to R. Barber or

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order, with six per cent. interest from date. Barber was to have this note discounted, and apply the proceeds thereof to the payment of the note to said Smith, becoming due in June. The payment of this note to Barber was also secured by deed of trust on the same property on which the deed of trust in favor of Smith had been given. Barber gave to Wheeler the following receipt for this note:

"Received, St. Louis, March 15th, 1850, of Jonathan Wheeler, his note at twelve months, for thirteen hundred and seventy-five dollars, to be negotiated, and the proceeds of said note to be appropriated in payment of a certain note executed by him to Solomon Smith for twelve hundred dollars, secured by deed of trust, and falls due on the 2d day of June next, as can be seen by referring to the records. "R. BARBER."

It appears that this note of \$1375 was given alone for the purpose of getting it discounted, in order to pay the note to Smith; that Barber did not pay the note to Smith at maturity, nor did he ever pay it, nor has it been paid; that Barber did not negotiate the said note for \$1375 until some six months after it purported to be due; that is, some time in September, 1851; that he then endorsed the note and delivered the deed of trust to Barret, who took the same in good faith, without knowing the facts relative to the making thereof, for a valuable consideration; that the plaintiff, Wheeler, had no knowledge of this assignment to Barret, nor had he any advantage therefrom; that Barber is dead and his estate insolvent.

This is a proceeding by Wheeler to have the collection of this \$1375 note enjoined, the note cancelled, and the deed of trust removed from his property, and for general relief.

Upon the agreed case, the court below declared the law for the plaintiff, and decreed that Barret be perpetually enjoined from negotiating and transferring the said \$1375 note, and that he and all persons be enjoined from attempting, by action at law or otherwise, to collect the same, and that defendant deliver up the note for cancellation, &c.

1. Now, upon whom shall this loss fall? The note being over-

due when Barret got it from Barber was, of itself, a sufficient fact to make Barret enquire and ascertain the reason of its dishonor, and although the agreed case shows that he took it in good faith and for value, yet he must stand and can only stand in Barber's place. He must be considered as giving credit and faith to Barber only, and to become willing to take the note as Barber held it. The note is payable to Barber, or order, twelve months after date. Eighteen months after date, Barber sells it to Barret. What principle is there which can be invoked to take this case out of the general rule applicable to such transactions? It seems on its face to be merely a promissory note in a negotiable form, payable to Barber or his order, for a large sum of money, at long credit. What can make us consider the payee in this note as the mere agent of the maker, with unlimited power to dispose of the note, unrestrained as to time or other circumstances? If Barber be the agent of Wheeler at all, he must be considered so to a special intent and for a specified object, with special and limited authority.

There is, in our opinion, nothing in the record which takes this case out of the ordinary course of adjudication in promissory notes and bills which come into the hands of third persons after dishonor. It must therefore be controlled by such.

Judge Story says: "If the transfer is after maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not. The equities here meant are such as attach to the particular note, or such as grow out of the transaction which gave rise to the note." (Story on Prom. Notes, §178.) In *Emerson v. Crocker*, (5 N. Hamp. 163,) the Supreme Court of New Hampshire held that the rule that, "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it, holds only in cases of innocent holders, into whose hands the note came in regular course of business, before it became payable. If the note be overdue at the time

the agent so transfers it, the person who takes it must stand in the situation of the agent." In *Gullett v. Hoy & Orton*, (15 Mo. Rep. 400,) it was said, "This note being endorsed after due, the endorser took it subject to all the equities attached to it in the hands of the payee."

In *Furman v. Hasken*, (2 Caines Rep. 372,) Kent, Chief Justice, says: "The note was payable on demand; it was not negotiated to the plaintiff until nearly eighteen months from the period when it was given." The Chief Justice said: "The lapse of time must clearly be considered as placing the note in the situation of one due and dishonored, and as imposing on the endorsee the same risk. No person of common prudence will take such a note, without inquiry concerning the occasion of its being so long outstanding, and it is incumbent on him to satisfy himself that it is good. He takes it on the credit of the person from whom he receives it."

In *Brown v. Davies*, (3 Term Rep. 80,) it was held that, where a promissory note has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to show that the note was paid, as between him and the original payee from whom the plaintiff received it.

It is needless to multiply authorities upon this point. It is now the settled rule that the person receiving a note over due takes it with all its equities between maker and payee. In this case, then, we consider that Barret stands in the same situation as his endorser, Barber, did, and that being so, the plaintiff, Wheeler, is entitled to have relief against the note.

The judgment of the Court of Common Pleas must therefore be affirmed; Judge Leonard concurring herein.

SCOTT, Judge. In my opinion, this judgment should not stand. Admitting that Barret's taking the note after it was overdue gave a right to Wheeler to insist on all equities he might have against it, in an action by Barret, yet he has no equity and shows none. His only defence is, that he has been

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defrauded by his own agent. It is a rule that, when one of two innocent men must sustain a loss caused by a third person, he who has enabled that person to commit the wrong must bear the loss.

A motion for a rehearing of the above cause was overruled.

KIMBALL, vs. DONALD & OTHERS, Appellants, and BENOIST & ANOTHER, Respondents.

1. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of the fund, so as to defeat attaching creditors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill.

Appeal from St. Louis Court of Common Pleas.

This was a petition in the nature of a bill of interpleader, filed by Kimball, to compel the defendants to litigate among themselves their respective claims to a fund in his hands, as the factor of Stone & Walworth, of New Orleans. The defendants Donald and others claimed as attaching creditors of Stone & Walworth, the plaintiff having been summoned as garnishee in suits brought by them. The defendants Benoist & Co. claimed under a bill of exchange drawn in their favor by Stone & Walworth upon Kimball, prior to the attachments, which, as they contended, amounted to an equitable assignment of the fund. The cause was tried by the court without a jury, and substantially the following facts found:

Stone & Walworth were partners in business in New Orleans, and Kimball was their factor in St. Louis. They were in the habit of making consignments to him, and drawing bills upon him, which he accepted and paid. On the 5th of May, they shipped to him fifty-six tierces of rice on the steamboat John Simonds, and ten hogsheads of sugar on the steamboat Charles

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Belcher, there being then an unadjusted balance due from him on account of previous consignments. On the 13th of May, they drew upon him a bill of exchange, of which the following is a duplicate :

“ Exchange for \$2500.

“ New Orleans, May 13th, 1853.

“ Twenty days after sight of this second of exchange (first unpaid,) pay to the order of L. A. Benoist & Co., twenty-five hundred dollars, value received, *and charge the same to account sugar, Belcher, rice, Simonds, and account sales.*

“ STONE & WALWORTH.

“ To Mr. E. B. Kimball, St. Louis.”

On the 14th of May, Stone & Walworth notified Kimball by telegraph of the drawing of the bill, and requested him to pay it to Benoist & Co.

On the same day, Benoist & Co., having been notified by telegraph by their firm in New Orleans of the drawing of the bill, called upon Kimball, who then *promised to pay to them on the bill whatever amount might be found in his hands due to Stone & Walworth.* Subsequently, Kimball was summoned as garnishee in the attachment suits brought by the other defendants, and when the bill reached St. Louis, he refused to accept it.

Upon these facts, the Court of Common Pleas awarded the fund to Benoist & Co., and from this judgment, the attaching creditors appealed.

Shepley and Kasson, for appellants. 1. The bill of exchange did not operate as an assignment of any funds of the drawers in the hands of Kimball. (3 Sandf. S. C. R. 257. 1 Id. 416. 3 Comstock, 243. 1 Curtis U. S. R. 133. *Luff v. Pope*, 5 Hill (N. Y.) 413, 417. Same case on appeal, 7 Hill. 2 Am. Lead. Cases, (H. & W.'s notes,) ed. 1852, p. 141. 1 Seld. (N. Y.) 525. 2 Id. 412. 15 La. Rep. 255. 3 Kent's Com. 76. Story on Bills, §46, §47.) 2. The verbal promise of Kimball to Benoist & Co. cannot defeat the right of the attaching creditors to recover. It was not binding as

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an acceptance of the bill, which must be in writing, nor as an original undertaking, because it is an undertaking to pay the debt of another and without consideration.

C. C. Whittelsey, for respondents. 1. Benoist & Co. had a direct action against Kimball on his promise to pay them whatever balance might be in his hands. (Chitty on Bills, 8, 9, 350, 351, *n*, *z* and *a*, 14 East, 598, *n*. *Curtis v. Norris*, 8 Pick. 280, 282. 12 Mass. 206, 211. 5 Peters, 580. 1 Wash. C. C. R. 424. 10 Mo. Rep. 525-38. Chitty on Contracts, 45. 12 Mo. Rep. 430-33. 5 Peters, 580.) 2. Benoist & Co. are entitled to the fund in preference to the attaching creditors, as being the assignees of the debt due by Kimball to Stone & Walworth. (Chitty on Bills, 9 and 8, *n*. 1 and 2. *Cutter v. Perkins*, 12 Mass. 206, 211. *Correr v. Craig*, 1 Wash. C. C. R. 424. *Stephens v. Stephens*, 1 Ashmead, 190. 17 Mass. 327. 11 Mass. 385. 2 Jones, 167. 4 Dallas, 379. Searg. on Attachment, 80-84. Cushing's Trustee Process, 171. Drake on Attachment, §498, 501, 510-13, 611, 615, 617, 621. 20 Pick. 132. 3 Swanst. 392. 4 Mylne & Craig, 690. 21 Eng. Law & Eq. Rep. 566. 15 Eng. Law & Eq. 27. 5 Wheat. 277. 1 Peters, 264, 288. 3 Binney, 394.)

LEONARD, Judge, delivered the opinion of the court.

This is a bill of exchange, and not a mere order to pay over a particular fund; and the direction at the foot of the bill, to charge to the particular account there indicated, does not change the character of the instrument, (Story on Bills, §66;) and we think that, after being refused acceptance, it cannot take effect as an equitable assignment of the fund, even connected as it is with an express promise on the part of the drawee to pay whatever balance may be found in his hands.

It is true that any thing amounting to a present transfer of a specific fund for value is a valid assignment in equity, which changes the property as against the assignor, and cuts off subsequent attaching creditors. No form is required; it is suffi-

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cient that the transaction is, in the contemplation of the parties, a present sale of the subject matter assigned, vesting a present interest in the assignee, and not resting merely in agreement to be executed thereafter. In a word, any thing that shows an intention on the one side to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration.

Upon this principle, courts allow an order payable out of a particular fund belonging to the drawer, and which has been delivered to the payee for value, to take effect as a present transfer of the debt; and Lord Chancellor Truro, in a recent case, 1852, (*Rodeck v. Gandell*, 15 Eng. Law and Eq. Rep. 30,) stated it as the result of all the cases that "an agreement between a debtor and a creditor that the debt owing should be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor, upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid, equitable charge upon such fund; in other words, will operate as an equitable assignment of the debt or fund to which the order refers."

This construction of such transactions generally executes the real intention of the parties, and is adopted for that reason, and therefore, if there be any thing from which a different intention ought to be inferred, as where the fund is to pass at a future day, the matter resting for the time being in agreement, (*Rogers v. Hosack's Ex'r*, 18 Wend. 334, and *Hoyt v. Story*, 3 Barb. Sup. Ct. Rep. 265,) or where the party retains the subject under his own control, by giving the order not to the assignee, but to his own agent, (*Rodeck v. Gandell*, 15 Eng. Law and Eq. Rep. 30,) the transaction is not allowed to have the effect of a present transfer. And so we think, in the present case, we cannot give to this transaction this effect, without defeating, in all probability, the real intention of these parties, and adopting a rule of decision that would not only have

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that effect in a majority of the cases to which it would be applicable, but also of introducing into commercial transactions of this character great confusion.

We are reminded that a bill of exchange is the transfer of a debt due to the drawer from the drawee, and so it undoubtedly is, as between drawer and drawee, when the latter accepts; but what is proposed here is, to make a bill that the drawee refuses to accept operate as a transfer of the fund, without any reference to the intentions of the drawer, under the circumstances that have occurred. The object of drawing a bill is to convert a debt, in theory supposed to be due from the drawee to the drawer, into a transferable chattel that may pass from one to another by endorsement or delivery, and this object is consummated by the acceptance, which binds the acceptor to whoever becomes the holder, to pay as the original debtor, absolutely and without any reference to the state of the account between himself and the drawer, leaving the latter still liable under his original conditional obligation to pay in default of payment of the primary debtor. These are the engagements created between the parties, (drawer and drawee,) and when acceptance is refused, the object the parties had in view being defeated, the only obligation upon the bill is against the drawer, who is remitted to his original rights in respect to the fund in the hands of his supposed debtor, and liable to pay according to his original undertaking. No one supposes that it was the intention of the parties, at the time this bill was drawn, that, if it could not take effect as a bill, on account of the refusal of the drawee to accept, that then it should operate as an equitable assignment of whatever funds the drawee might have in his hands belonging to the drawer. That event was already provided for by the drawer's undertaking to pay himself upon such refusal. What authority, then, have we, under these circumstances, to put into the transaction a stipulation which the parties never thought of, and would have rejected at once, had it been suggested to them, and then give effect to the transaction as an equitable assignment, in order to carry out this supposed intention. Looking

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to the probable intention of parties, and to the interest of business, we cannot but think such a decision would be very mischievous in its practical operation, not only defeating the real intention of the parties in a majority of the cases to which it would be applied, but also greatly complicating the business affairs of men.

This seems, too, to be the view taken of this question in the most commercial state in the Union, the decision of whose tribunals, in questions of this character, must certainly command our respect, and when approved by our own reason, may be very safely followed as guides in determining commercial questions; and we refer to the following cases in the New York courts, where the doctrine is expressly declared and applied, that a bill of exchange does not operate as a transfer of the fund, so as to protect it from third parties claiming subsequently from the drawer. (*Pope v. Luff*, 5 Hill, 417, and 7 Hill, 578. *Cowperthwaite v. Sheffield*, 3 Comst. 243. *Winter v. Drury*, 1 Selden's Rep. 525.)

The same doctrine seems to have been acted upon in *Wilson and others v. Lorard and others*, (15 La. Rep. 255,) which, although decided under a different system of law from our own, may yet be referred to upon a commercial question, (a matter rather of general than of local law,) at least to show how this question is dealt with practically in a highly commercial community.

It is further to be remarked that the case of *Corser v. Craig*, (1 Wash. Cir. Ct. Rep. 424,) to which we have been referred as a conflicting authority, (even if it must be so understood,) is but a *nisi prius* judgment, made in the hurry of a circuit trial, and many years ago, when the law upon the subject was certainly not as well settled as it is at present; and highly respectable as the judge certainly was who delivered the opinion, yet the ground of it failing to satisfy our judgments, and the case itself being of no obligatory authority upon us, we cannot allow it to control our decision.

The result is, that the payees of the bill acquired, under the

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circumstances of the present case, no specific lien upon the fund in the hands of the drawee, so as to cut out subsequently attaching creditors, and the judgment must therefore be reversed, and a judgment entered here, distributing the fund among these creditors according to the priorities of their attachments; and the other judges concurring, it is ordered accordingly.

NOTE.—A petition for a re-hearing of the above cause was overruled. The point relied upon was, that the telegraphic order and the promise to pay to Benoist & Co. gave the latter a direct action at law against Kimball for whatever sum might be in his hands, the bill of exchange cutting no figure in the transaction, except as showing a good consideration for the promise.

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ENGLER, *vs.* RICE & OTHERS, Respondents, and BENOIST & ANOTHER, Appellants.

1. See *Kimball v. Donald*, ante.

Appeal from St. Louis Circuit Court.

This was a petition in the nature of a bill of interpleader, filed by Engler, having in his possession, as factor of Stone & Walworth, a fund claimed by Benoist & Co. by virtue of a bill of exchange drawn in their favor, and by the other defendants as plaintiffs in attachment suits, in which they had summoned Engler as garnishee.

The facts found by the Circuit Court are substantially the same as those of the preceding case of *Kimball v. Donald*, except that in this case there was no verbal promise to pay.

The bill drawn in favor of Benoist & Co. appears from the finding to have been an ordinary bill of exchange. On the day after it was drawn, Stone & Walworth advised Engler of it by telegraph, and requested him to protect it.

Mr. *Whittelsey*, for Benoist & Co.

Mr. *Shepley*, for Rice and others.

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LEONARD, Judge. This case is in all material respects similar to the case of *Kimball against Donald and others*, determined at the present term, and the result of that opinion is to affirm the present judgment. And the other judges concurring, it is accordingly affirmed.

HILL, Defendant in Error, *vs.* THE CITY OF ST. LOUIS, Plaintiff in Error.

1. A circuit court has no power to insert a clause in a judgment, authorizing the party against whom it is rendered to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, a judgment was set aside at the next term, and a new judgment rendered, it was treated as a nullity by the supreme court, and the first judgment reinstated.

Error to St. Louis Circuit Court.

The case is sufficiently stated in the opinion of the court.

T. T. Gantt, for plaintiff in error.

S. A. Holmes, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This was a petition for an injunction, restraining the collection of taxes by the city of St. Louis for the year 1850, which had been assessed upon certain property of the petitioner.

The points relied on for the granting of the injunction were the same that were shown in the case of *Benoist et al., v. The City of St. Louis*, reported in 19 Mo. Rep. 179. The city filed her answer, and the case was continued from time to time until at the November term, 1853, it was, on the motion of the petitioner, by her counsel, dismissed. The order of dismissal was on the 21st day of February, 1854, still being the November term, 1853. The dismissal was at the costs of the petitioner. It was agreed at the same time, and was so embodied in the order, that the petitioner pay within ten days the said costs and taxes assessed, with interest from the date of the injunction,

into the court, and in default thereof, that execution issue therefor. Afterwards, at the same term, to-wit, on the 11th day of March, 1854, the petitioner having failed to pay the taxes, costs and interest, within the ten days, the Circuit Court, on motion of the city by her counsel, rendered a judgment against the petitioner for the amount of said taxes, costs and interest from the 22d day of January, 1851, and for execution therefor, which judgment was for the sum of \$231 60, being the amount of taxes and costs and the interest thereon, together with the costs of this suit. After the formal entry of this judgment in favor of the defendant against the petitioner, an order in the following terms is entered: "And it is further ordered, that said plaintiff have leave to file her motion to set aside this judgment, and to present and file her bill of exceptions to the proceedings herein, on or before the first day of the next term of this court."

The plaintiff afterwards, at the April term, 1854, made her motion as follows, after naming the parties:

"Now at this day, in pursuance of leave heretofore given, comes the plaintiff by her attorney, and moves the court to set aside the assessment of damages and the judgment therefor, upon the dismissal of this suit, for the following reasons: 1. Because the court erred in giving judgment upon said dismissal for the amount enjoined, and six per cent. damages on such amount. 2. Because the court, upon such dismissal, erroneously proceeded to assess the damages of its own accord, without giving the plaintiff an opportunity to be heard upon such assessment."

This motion was sustained by the court, so far as it relates to the assessment of damages, and the judgment heretofore rendered was, as regards the damages on the dissolution of the injunction, set aside. On the 29th of May, at the said April term, the parties appear again in court, and submit to the court the question of damages to which the defendant is entitled by reason of the dissolution of the injunction sued out in the case. It is then considered by the court that the defendant recover of

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the plaintiff the sum of \$194 90 as and for the said damages, together with the costs of suit, and that execution issue therefor, giving no damages on the dissolution of the injunction. The city moved the court to review and reconsider the judgment in this cause, and to amend and correct the assessment of damages by adding thereto interest at the rate of six per cent. per annum from the date of the injunction to the present time. This motion was overruled and excepted to, and the city brings the case here by writ of error.

The points raised by the city counsellor on this record question the power of the Circuit Court to set aside the judgment given at the November term, 1853, by any order which that court could make at the April term, 1854; also, the ruling of the Circuit Court in refusing to allow damages on the dissolution of the injunction.

1. In the consideration of this case, should this court be of the opinion that the court below had no power or authority at the April term over a judgment rendered by it at a preceding term, then it will do away with the necessity of examining and deciding upon the second question, that is, the one in relation to the damages upon the dissolution of the injunction, for all the proceedings and orders taken in the case at the April term, in that event, will be regarded as of no force or effect—mere nullities.

Were it not for that most extraordinary order, after the rendition of the final judgment in March, 1854, in favor of the city against the petitioner, by which the court gave leave to the plaintiff, whose petition had been dismissed at her own motion, to appear on the first day of the next term, and move to set aside this judgment and to file her bill of exceptions, there would not be a doubt on this question. All control over the judgment ceased at the end of the term at which it was rendered, except mere formal emendations or corrections allowed by the statutes of jeofails.

In the case of *Ashby v. Glasgow et al.*, (7 Mo. Rep. 320,) this court held the following language: "When a final judg-

ment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it was rendered, be set aside; for, during the term, all the proceedings are in the breast of the court, and they may be altered or vacated as justice requires. But when the term is past, then the control of the court ceases, and no alteration or amendment can be made, but such as is authorized by the statute of jeofails and amendments." Blackstone says, in his Commentaries, book III, ch. 25, side p. 406-7: "But when once the record is made up, it was formerly held that, by the common law, no amendment could be permitted unless within the very terms in which the judicial act so recorded was done; for, during the term, the record is in the breast of the court, but afterwards it admitted of no alteration. But now the courts are become more liberal, and where justice requires it, will allow of amendments at any time, while the suit is pending, notwithstanding the record be made up and the term be past; for they at present consider the proceedings as in *feri* till judgment is given, and therefore that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term."

"But yet, during the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that time, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth no alteration, averment or proof to the contrary." (Coke's Litt. sec. 438, lib. 3, p. 260.) The question now occurs, had the Circuit Court authority to make that order granting leave to file exceptions and make motions to set aside the judgment at a future term. If it had power to grant leave to a party to make such motions at one future term, what deprives it of the power to grant similar leave to a party a second or third or fourth term? We say it has no such power, and it is right and just that it should have no such power. There could never be an end to the proceedings of a controversy between parties where such power be placed in the hands of a

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doubting and irresolute judge ; there might be no telling when a judgment is to become final. One party is allowed, by leave entered on record at one term, to move to set aside the judgment at the next succeeding term ; and then the other is allowed the same privilege at a still succeeding term, *toties quoties*, and when will the matter end ? It will not do to say that this power lies in the discretion of the judges. This is the fruitful source of judicial error, of judicial abuse. Such a power is withheld from the courts ; it is not found in the field of discretion, as widely extended even as some would have it.

The record in this case shows this singular state of facts, that after judgment entered on the dissolution of an injunction for the amount of taxes, costs, &c., and interest at six per cent. from the time of the injunction granted up to the dissolution, and an order for execution on said judgment to issue ; that, without any motion therefor, the Circuit Court, of its own accord, made the order granting leave to the petitioner to file her motion at next term to set aside this judgment, and to file her bill of exceptions ; this done without any consent or understanding of the opposite party. This order was improperly made, nay, it was without authority, and must be treated and regarded as a nullity.

This being the case, all the proceedings and orders made at the April term of the court are considered irregular and void. The judgment given then at the April term, in which no damages for and on account of the dissolution of the injunction were allowed, is set aside, as well as the order setting aside the judgment of the former term ; and the judgment given by the court at the November term, 1853, for the sum of \$231 60, is reinstated and affirmed. This judgment must bear interest at six per cent. from the time it was rendered.

This view disposes of the case, so far as regards the second question. The judgment, then, given below by the Circuit Court at April term, 1854, is reversed, and the judgment of the November term, 1853, is affirmed, and is ordered to be carried into effect by the court below ; Judge Scott concurring herein.

Shepard v. City of St. Louis.—Page & Bacon v. Lathrop.

SHEPARD, Defendant in Error, *vs.* THE CITY OF ST. LOUIS,
Plaintiff in Error.

1. See *Hill v. The City of St. Louis*, ante.

Error to St. Louis Circuit Court.

T. T. Gantt, city counsellor.

S. A. Holmes, for defendant in error.

RYLAND, Judge. This case was submitted to the court on the briefs and statements made by counsel in the case of *Hill v. The City of St. Louis*. The opinion in the case of *Hill v. The City* will therefore answer for this, as the points are the same in each.

The judgment, then, at the April term, 1854, is reversed and set aside, and the judgment at November term, 1853, is reinstated and affirmed; Judge Scott concurring.



PAGE & BACON, Defendants in Error, *vs.* LATHROP, Plaintiff in Error.

1. Possession by the endorser of a dishonored bill of exchange is evidence sufficient to enable him to maintain an action thereon, though at the same time there appears upon the bill an endorsement in full from him to another party.
2. Although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. (SCOTT, J., dissenting.)
3. Can a payee, who receives a bill, drawn by an agent in the name of his principal under a written authority shown to him at the time, afterwards charge the agent as principal, as having drawn without authority?

Error to St. Louis Court of Common Pleas.

Page & Bacon sued Lathrop as the drawer of a draft on David Green, of Baltimore, for \$1000, dated December 18, 1849, at twenty days' date, payable to their order, and signed

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"Green & Co., by H. F. Lathrop, agent." In the body of the draft was the following memorandum: "*This draft being drawn on your letter of credit to me, dated Baltimore, November, 30, 1849.*" It was endorsed as follows: "*Pay Samuel Harris & Sons, or order, without recourse on us. Page & Bacon.*"

The plaintiffs alleged in their petition that the defendant drew the bill without due authority. The letter of November 30, 1849, referred to in the bill, contained the following clause: "*You must not let one of our drafts come back upon any account, and can draw upon here at twenty days' sight at all times, when for our benefit.*"

The defendant then offered to show that he was the agent at St. Louis of Green & Co., who were the proprietors of an express from Baltimore and New York to the western cities; that Green, one of the members of the firm, resided in Baltimore, and Jones, the other member, at Cincinnati; and that he, as their agent, had general authority to draw bills on Baltimore or Cincinnati to meet drafts on him; that the bill sued upon was drawn to meet other drafts of Green & Co. upon him, which he had not sufficient funds in his hands to meet; and that he was instructed by a letter dated *Cincinnati*, November 30, 1849, not to suffer any drafts of Green & Co. to go back protested, and authorized to draw at fifteen or thirty days' date, if necessary, to protect the credit of the house. All this evidence was excluded by the court below, and the jury were instructed that, as the letter, by authority of which the bill purported to be drawn, did not authorize it, the defendant was liable as principal. Two instructions asked by the defendant were refused, and after judgment against him, he sued out this writ of error.

B. A. Hill, for plaintiff in error, among other points, made the following: 1. It was a question of fact for the jury, whether the letter, referred to in the body of the bill, authorized the drawing of such bill. (*Taylor v. Labeaume*, 14 Mo. Rep. 572. 19 Ala. 165. 20 Ala. 313.) 2. The court erred in holding that the defendant could not show his authority by any

other evidence than the letter referred to in the body of the bill. (*Mechanics' Bank v. Bank of Columbia*, 5 Wheaton, 326. 3 Cranch, 415. 1 Wash. C. C. R. 174. Story's Agency, §270. 17 Wend. 40. Cow. & Hill's Notes, Phill. Ev. 3 vol. 1464 and 5. 19 Johns. Rep. 60. 9 Id. 334. 13 Id. 307. 10 Wend. 275. 8 Pick. 56-61. 12 Mass. 173.) 3. The plaintiffs were bound to know the extent of Lathrop's authority, and cannot now be heard to deny it. (1 Pet. 290. Walk. Ch. Rep. 214. 12 Smedes & Marsh. 398. Story's Agency, §72, §81, §265.) 4. The plaintiffs are not now the legal holders of the bill. It belongs on its face to Harris & Sons. 5. The defendant cannot be sued as the drawer of the bill, which, upon its own face, is the bill of Green & Co. If an agent exceeds his authority, he must be sued for fraud and deceit and not as a party to the bill. (*Ballou v. Talbot*, 16 Mass. 461. *Long v. Colburn*, 11 Id. 97. *Johnson v. Smith*, 21 Conn. 627. 12 Eng. Law and Eq. 430. Note to *Thompson v. Davenport*, 2 Smith's Lead. Cases, 223.)

Knox & Kellogg, for defendants in error. 1. There was no necessity for a re-indorsement of the bill, to enable the plaintiffs to maintain a suit upon it. (*Dugan v. The United States*, 3 Wheat. 172.) 2. It was not competent for appellant to prove any authority to draw the bill, outside of the letter under which, on the face of the bill he claimed to act. (1 Denio, 471. 8 Wend. 494. 2 Ala. 718. Story on Agency, (3d ed.) §76, §264, §166, §169. 1 Greenl. Ev. §275.) 3. The weight of authority is manifestly in favor of the liability of an agent who draws a bill without authority, upon the paper itself, as a party thereto. (Story on Agency, §264. 3 Johns. Cases, 70. 1 Denio, 480. 8 Wend. 494. 4 N. H. 239. 2 Crompt. & Mees. 530. 2 Ala. 718.)

RYLAND, Judge, delivered the opinion of the court.

This case presents two or three important questions which I will state and give our views and opinions thereon. 1. Is the possession by the endorser of a dishonored bill of exchange

evidence sufficient for him to maintain an action thereon, when, at the same time, there appears upon the bill an endorsement in full from such holder to another party? 2. If a bill of exchange purports to have been drawn under a special written authority referred to, can other evidence be gone into, to establish the agent's authority, so as to relieve him from personal liability on the bill, as a person acting for another, without authority? 3. If the payees saw the authority and took the bill under it, can they afterwards deny the authority, and charge the agent as principal for acting without authority?

1. The first question we answer in the affirmative. The endorser of a dishonored bill being in possession, although there is on the bill an endorsement in full from him to another party, may yet maintain his action thereon. In support of this doctrine, we refer to the case of *Dugan v. United States*, (3 Wheat. 172.) In this case, the Supreme Court of the United States held that, "if any person, who endorses a bill to another, whether for value or for collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full, subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill or not, as he may think proper." In *Warren v. Gilman*, (15 Maine, 70,) the same doctrine is held. In *McGee v. Prouty et al.*, (9 Metc. 547,) the same doctrine is held in regard to a promissory note that had been negotiated. In *Picquet v. Curtis*, (1 Sumner's U. S. C. C. Rep. 478,) the same doctrine is held. (See Story on Prom. Notes, §452.) In answering, then, the first question stated above, it is the unanimous opinion of this court, that such endorser may now maintain an action under such circumstances. Such is the modern doctrine of the American courts.

2. In answer to the second question, the majority of the court are of opinion that such other evidence may be gone into,

to show that the agent had authority to draw the bill, although the special instrument referred to on the face of the bill may not give him authority to draw, as he has done. The real question in such a case is, had he the power to draw, and we cannot see why he should be held personally liable, because he, on the face of the bill, refers to power given by letter of a certain date, when there may be no such power in any letter of that date; but there may be general power and authority to draw such bill, by previous letters; that is, we cannot suppose the bare mistake of the agent, in referring to a paper for the proof of his authority, precludes him from proving such authority by any other competent evidence.

This does not, in our opinion, have any thing to do with the doctrine that a special agent must strictly confine himself within the scope of his authority; nor does it take away the personal liability of the agent who acts without authority.

It is a settled doctrine that, where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound. (See *Rathbun v. Budlong*, 15 Johns. 1.)

In the case of the *Mechanics' Bank v. Bank of Columbia*, (5 Wheat. 337,) Mr. Justice Johnson, in delivering the opinion of the court, says: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends on the facts: 1, that the act was done in the exercise, and 2, within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury, and this enquiry is not confined to written instruments, (to which alone the principle contended for could

apply,) but to any act, with or without writing, within the scope of the power or confidence reposed in the agent.

In *McClung's Ex'rs v. Spotwood*, (19 Ala. 165,) the Supreme Court of Alabama held that the question of agency is a matter of fact, which it is the province of the jury to decide upon; and if there is any evidence tending to prove the authority of the agent, it should be left to the jury to determine the sufficiency and weight of that evidence. Dargan, Chief Justice, says: "But in most cases, if not in all, the question of agency is a matter of fact, which it is the province of the jury to determine upon under the instructions of the court, and if the testimony tends to prove that the person acting as agent had authority from his principal to do the act, then it is manifest that the court cannot exclude from the jury the act itself, without overstepping the line of its duty, and assuming to determine a matter which belongs to the jury, to-wit: the authority of the agent to do the act. The correct rule is this, if there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court; but if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the sufficiency and weight of the testimony." (See also *McMorris v. Simpson*, 21 Wendell, 610. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.)

It is well settled, if a private agent draw a bill, or enter into any other contract in his own name, without stating that he acts as agent, so as to bind his principal, he will be personally liable. (Chitty on Bills, 36. 5 East, 148. 1 Bos. & Pul. 368. 1 Term Rep. 181.) It is not sufficient to charge the principal, or protect the agent from personal liability, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. But here the question is, can the agent, who draws a bill, stating on its face that it is drawn by virtue of authority given to him by a letter from the principal, of a certain date, be permitted to show by other evidence than that letter, that he had the power to draw

such bills? Is the agent acting within the limits of the business prescribed? Has the power to draw such bills been given? Can he show that he has authority for the act done? These are the real matters to be regarded, and not the particular mode or way in which the evidence of such power can be offered or allowed.

In the opinion then of Judges Leonard and Ryland, the second question must also be answered in the affirmative. It is a question of authority only, and no rule should limit the proof of such authority to the mode only, or to any one particular instrument of proof alluded to or referred to in the act of the agent. In the opinion, then, of these judges, the judgment must be reversed.

3. In answer to the third question, there is some doubt. Judge Scott is inclined to the opinion that, if the payees, after having had an opportunity of seeing and examining the authority under which the agent draws the bill, and making no objection as to any want of such authority, purchase such bill, they ought not to be allowed afterwards to set up the absence of such power in the instrument referred to, as giving the authority to the agent as a reason why they should hold the agent personally responsible. Judge Leonard gives no opinion on this point, and Judge Ryland is inclined to doubt the propriety of holding the payees bound. However, without wishing to be understood as giving any opinion on that question, either way, and having come to the conclusion that the court below erred in giving the instruction for the plaintiffs, in relation to the second question at the beginning of this opinion, the judgment below is reversed, and the cause remanded; Judge Leonard concurring.

SCOTT, Judge. In my opinion, as the bill was drawn in reference to a special authority, it was not competent to show by parol evidence that there was any other authority to draw it. The expression of one thing is the exclusion of another, and the giving of special authority to draw a particular bill shows

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that it was not intended that it should derive its existence from any general authority. An authority to an agent to do a thing at his discretion, cannot stand with an authority to do the same thing in a particular way. These powers must be so construed as to harmonize. That can only be done by making the special an exception to the general power.

MCCUNE & VANDEVENTER, Plaintiffs in Error, vs. HULL & WIFE, Defendants in Error.

1. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis Circuit Court by the act establishing the Land Court.

Error to St. Louis Circuit Court.

The petition alleged that the plaintiffs and defendants were tenants in common of a tract of land in St. Louis, and that the defendants had received all the rents and profits. The plaintiffs prayed for an account, and for judgment for their proportion. A demurrer to the petition, for want of jurisdiction, was sustained by the Circuit Court.

C. C. Whittlesey, for plaintiffs in error.

C. B. Lord, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

1. By the constitution, it is prescribed that the Circuit Court shall have exclusive original jurisdiction in all civil cases, which shall not be cognizable before justices of the peace, until otherwise directed by the general assembly. The Circuit Court, then, is the original constitutional court, possessing all jurisdiction not exercised by justices of the peace. When, therefore, other tribunals are created, clothed with a portion of the jurisdiction of this original court, and a question arises between this original court and those afterwards created, in cases of

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doubt, the presumption should be in favor of the original court. This action is what would have been formerly called an action of account, given by our statute to one co-tenant against another, who has received "more than his due proportion of the *benefit* of the estate." It is a case in which no action lay at common law, for the want of privity of contract between the parties. It was a wrong merely for which the statute of the 4th of Anne, which we have adopted, gave an action. It is no action founded on contract relating to land, within the meaning of the second section of the act creating the land court; nor is it for rents, emblements, crops or annual productions of land as such. The plaintiffs had no right to these as such, but a compensation for their co-tenant receiving more than his benefit of the estate. (R. C. 1855, p. 55.) The section of the statute referred to contemplates those actions in which a right to rents, emblements, crops or annual productions as such is asserted. The use of the land was not by contract, but by wrong.

Neither is the case within the last clause of the section relating to the leasing or renting of the land, or concerning the relation of landlord and tenant, as it is clear that this relation did not exist between the parties, there being in the petition no allegation of any contract, express or implied.

It would be extremely inconvenient to give the statute conferring jurisdiction on the Land Court such a construction, as would make its powers depend, not upon the form of the action brought, but upon collateral questions, which may or may not arise in the progress of the trial. Parties would never know where to bring their actions. They would have to lay them first, in order to ascertain the court possessing jurisdiction. This is a matter of no importance, and reason and convenience require that the court having jurisdiction of the main action must determine all questions arising in it, whether they relate to land titles or any other matter.

The other judges concurring, the judgment will be reversed and the cause remanded.

POMEROY & DURKEE, Respondents, vs. COONS, Appellant.

1. A firm composed of C. & G., and doing business under that style, was succeeded by another firm styled C., G. & Co., composed of C., G. and a son of C., which again was succeeded by a third firm of the same style as the first, but composed of C.'s son and G. During the existence of the last firm, a note was by G. given in its name to a party who had dealt with the first firm, and was without notice of its dissolution. *Held*, this was *prima facie* the note of the firm existing when it was given, and so not binding upon C., the member of the first firm of the same style. But if it was in fact given on account of that firm to a customer without notice, C. would be bound.

Appeal from St. Louis Court of Common Pleas.

The case is sufficiently stated in the opinion of the court.

Shepley, for appellant. The general principle that the liability of a retiring partner, as to parties who have previously dealt with the firm, continues until notice to them of the retirement, is only applicable when there is no change in the partnership name, so that every thing appears to go on as before. (Story on Partnership, 246-7-8. Collyer on Part. 483.) When there is a change in the style of the firm, this of itself is a sufficient notice. The style of the firm having once been changed, the members of the first firm cannot be made liable for the debts of a new firm afterwards formed by other parties, of the same style as the first, merely because of the similarity of names. The link having once been broken by the formation of the firm of Coons, Gallaher & Co., the plaintiffs, with or without knowledge of that fact, as to all subsequent transactions, stood just as if no firm of Coons & Gallaher had previously existed.

Krum & Harding and *A. M. Gardner*, for respondents. It appears that the respondents had dealings with the firm of Coons & Gallaher, while Mrs. Coons was a member of that firm, and does not appear that they had any dealings with the firm of Coons, Gallaher & Co., or ever had any notice of its existence. They had a right to believe that they were giving credit

to the first firm of Coons & Gallaher, until they had actual notice of the dissolution of that firm. (12 Barb. 27. 6 Johns. 144. 5 G. & J. 383. 5 Vermont, 149.) The formation of the firm of Coons, Gallaher & Co., however notorious, did not amount to such notice. (17 Pick. 365.) See also, 4 Barr, 205. 33 Maine, 366. 24 Vermont, 278. 8 Wend. 423.

LEONARD, Judge, delivered the opinion of the court.

The instruments here sued upon were an acceptance by Coons & Gallaher of a bill of exchange of the 15th of September, 1848, drawn by Stewart upon them, payable at four months, for \$387 30, and a promissory note of the 11th July, 1848, made by Stewart payable to Coons & Gallaher for \$328 70, at four months, and endorsed by them payable to the plaintiffs, and the action was against the defendant, Mrs. Coons, as a partner of the firm of Coons & Gallaher.

The proof conduced to show that there had been three mercantile partnerships in business at St. Louis in succession; one of "Coons & Gallaher," composed of Mrs. Coons and Hugh Gallaher, from 1843 until March, 1846; the second, of "Coons, Gallaher & Co.," composed of Mrs. Coons, Hugh Gallaher and B. F. Coons, from March, 1846, to March, 1847, and the third of "Coons & Gallaher," composed of B. F. Coons and Hugh Gallaher, from March, 1847, until the same time in 1849.

The question upon the trial being whether the defendant was liable upon these instruments, the substance of the instructions was, that if Mrs. Coons was originally a member of the first firm, during which time the plaintiffs had dealings with it, and Gallaher endorsed the note and accepted the bill in the name of Coons & Gallaher, the defendant is liable, unless she had previously withdrawn from the firm and given notice to the plaintiffs, or they otherwise had notice of the fact.

This direction cannot be sustained, and the cause must go back for a new trial.

1. In order to come to a proper understanding of this matter, and avoid the confusion that seems to be incident to it, let us first consider which of these two firms, doing business under the same name of Coons & Gallaher, was *prima facie* liable upon the paper, without any reference to the character of the creditor as a former customer of the first firm.

Although a partnership is not a civil person, like a corporation, yet it has this in common with an incorporated company, that, as the members of such a company transact their business in the corporate name, so the members of a partnership transact their partnership business in some name they assume for that purpose; and when a note is drawn in the partnership name by any one authorized to act for the firm, the partnership, or in other words, each member of this voluntary society is bound. In *Boyle v. Skinner*, (19 Mo. Rep. 83,) the note was payable to James A. Hardy, and there was a partnership composed of Hardy and two other persons, doing business under the style of James A. Hardy, and the court held that, in the absence of proof to show to whom or upon what account the note was given, the presumption was, that it was given to Hardy individually and not to the partnership acting under that name. So, here the presumption would be, in the absence of proof upon what account the note was given, that it was given in behalf of the existing partnership of Coons & Gallaher, and not of a partnership that had formerly existed and carried on business under the same style. In the instructions given, it seems to be admitted that, if the plaintiffs had been strangers instead of customers of the first firm of Coons & Gallaher, the presumption would have been as I have indicated, and upon the same principle, we presume it will be readily admitted that, if the third partnership had assumed a different name, and the instrument sued upon had been executed in such other name, Mrs. Coons would not have been liable. But it is argued that it is otherwise in reference to a customer of the old house, who took the paper without any notice that Mrs. Coons had retired from the partnership. If Mrs. Coons had retired, when her son first

came in, and the business had been continued under the same name, there would then have been such a continuation of the partnership by reason of the continuing identity of name and of some of the partners, that notes afterwards given on account of the continuing partnership would, in reference to a customer without notice, bind a retired partner, and the same consequence would have followed here, and for the same reason, if, after Mrs. Coons had retired in 1847, the remaining partners had continued the business under the old name of Coons, Gallaher & Co., and the note had been executed in that name. Here, however, there was no such continuation of the first partnership of Coons & Gallaher. The continuity between that firm and the third firm of Coons & Gallaher, composed of the son and former partner, was interrupted by the interposition of the second firm of Coons, Gallaher & Co., and a note given on account of this new firm does not bind, as such, a partner of the first firm; nor does a presumption arise even in favor of a former customer taking such a note, that it was given on account of that firm. It was not in the power of Mrs. Coons to prevent her son and Mr. Gallaher from doing their partnership business in their own names of Coons & Gallaher, nor was there any thing improper in it on their part. Assuming that the instruments were executed by Gallaher on account of the existing firm of Coons & Gallaher, it was the plaintiffs' misfortune, if misled by the identity of name, they took the paper under the impression that it was the paper of the old firm of Coons & Gallaher; but it proceeded from their own negligence, when there was a new existing firm of that name, which was not a mere continuation of the former firm, that they took it without first ascertaining on account of which firm it was given.

If the paper were in fact given by Gallaher on account of the first firm, then Mrs. Coons is liable, if the plaintiffs had been customers of the firm, and took it without notice that she had ceased to be a partner. Each partner is placed over the business of the firm—"præpositus negotiis societatis"—and as such has implied authority, in these commercial partnerships, to

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bind the firm for paper of this character, and although the partnership is in fact dissolved, this implied power continues to exist, in reference to customers of the house, who have no notice of the dissolution; and therefore a note afterwards drawn by a partner, on account of the firm, binds all the partners in favor of such person; but this leaves untouched the question upon account of what partnership the note was given, for, although the partners have still the authority to bind the firm, yet the firm is not bound unless the authority is exercised; and it cannot be said to be exercised, when the note is in fact given on account of a different partnership. If the third firm could be considered as a mere continuation of the first firm, so that a note executed upon account of that firm might be considered as executed on account of the same firm, of which the defendant was a member, then the difficulty we have suggested is obviated; and the defendant is clearly liable under the circumstances indicated, and it is, we presume, upon this idea that the court below proceeded.

But we do not consider the third firm, if it were in truth a partnership between Benjamin F. Coons and Gallaher, under the style of Coons & Gallaher, as a continuation of the first firm, in such a sense as to render a note executed on account of that firm binding upon the first firm in favor of a former customer without notice.

The general doctrine no doubt is, that the partnership still continues liable, notwithstanding the dissolution, in favor of a customer who takes without notice a note executed in the name and on account of the firm; and when a partner retires, and the business is continued under the same style, the continuing partnership is considered the same partnership within this rule, so far at least that a note, executed on account of this continuing partnership, binds the retired partner in favor of a customer without notice. But the cases have not gone the length of declaring that when this continuity has been broken up by the establishment of a new partnership, composed, in part, of other persons and under a new name, that upon the retiring of a

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partner from this second firm, who was a member of the first firm, and the establishment of a third partnership under the name of the first, and composed, in part, of members of the first firm, it shall be considered the same partnership, so that a note executed on account of it shall bind the first firm, and we shall not extend the rule to such a case. We repeat, if the instruments were, in fact, executed by Gallaher, on account of the first firm, Mrs. Coons is, of course, bound under the circumstances suggested in the instruction; but we think she is not bound if they were executed on account of the existing firm of Coons & Gallaher, and the continuity of that firm with the first firm of the same name, had been interrupted by an intervening firm, composed, in part, of different persons and doing business under a different name.

The consequence is, the judgment must be reversed, in order that the cause may be re-tried under this view of the law applicable to the case; and the other judges concurring, it is accordingly reversed and remanded.

NOTE.—A motion for a rehearing of the above cause was overruled. The point insisted upon was, that it did not appear that the respondents ever had any notice of the existence of the firm of Coons, Gallaher & Co.

OWEN, Appellant, *vs.* O'REILLY, Respondent.

1. Where a plaintiff, in a suit for wages, proves services, but fails to prove their value, an instruction that he cannot recover is erroneous, as he is entitled to a nominal sum at least.
2. Where the plaintiff, in a suit for wages, closes his case, having proved services, but not their *value*, but immediately afterwards offers to remedy the oversight, a court, in the exercise of its discretion, should permit him to do it.

Appeal from St. Louis Law Commissioner's Court.

Action for wages, begun before a justice. At the trial before a jury, upon appeal, the plaintiff introduced evidence tending to prove the services for which he claimed to recover, and

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closed his case, without having proved the worth of the services, and thereupon the court instructed the jury that he could not recover. He then offered to remedy the omission by the testimony of witnesses present in court, but this the court refused to permit, whereupon he submitted to a nonsuit, with leave, and after an unsuccessful attempt to set the same aside, appealed to this court.

R. S. MacDonald, for appellant.

Blennerhassett & Shreve, for respondent.

RYLAND, Judge. The court below should have permitted the plaintiff to introduce his testimony in relation to the value of the services he had rendered the defendant. The instruction that the plaintiff cannot recover in this case, upon the proof made, was erroneous. He was entitled to recover nominal damages at least. This instruction, then, should have been refused.

It was not a proper exercise of judicial discretion to refuse the plaintiff in this case his motion for leave to introduce this testimony. It was clearly an omission—a mere oversight—and the court ought at once to have suffered him to correct it. (*Brown v. Burrus*, 8 Mo. Rep. 30.) See also, *Rucker v. Eddings*, (7 Mo. Rep. 118.)

There could have been no necessity to have forced the plaintiff to suffer a nonsuit, when the inadvertence committed by him was so easily remedied.

The courts should exercise their discretion soundly for the advancement of right, and lend always an unwilling ear to mere technical objections, either in pleading or practice.

The judgment is reversed, and the cause remanded; the other judges concurring.

[END OF VOL. XX.]

RULES.

The following rule was adopted at the October term, 1851 :

No counsel will be permitted to speak in the argument of any cause in this court more than one hour, unless the time shall be extended by the court by special order, before the argument begins.

The following rules were adopted at the January term, 1855, at Jefferson City, and at the March term, 1855, at St. Louis :

Each party must furnish a brief in his case, which must contain a clear, condensed statement of all the facts necessary to show distinctly, and in as few words as possible, without the aid of the record, the questions to be discussed, the points of law to be made, and the authorities to be relied upon in support of the positions taken. It must be written in a fair, legible hand, without interlineation, and delivered to the clerk for the exclusive use of the judges, without being subject to the inspection of any other person, within the following times : In causes standing for argument on the first, second and third days of the term, on the first day of the term before noon of that day ; and in all other causes, one whole day before the day the case stands on the calender for argument. If this rule is not complied with, the cause will be taken by the court to be submitted, or it will be continued, as the court may deem right.

When the case turns upon the propriety of the instructions given or refused, all the instructions given for the party obtaining the judgment, and all the instructions on the other side, both given and refused, shall be copied into the brief.

The great increase of the business of this court renders it necessary that the judges shall have every facility in the transaction of the public business, and it too frequently happening that the time of the judges is unnecessarily consumed in decyphering the transcripts filed here, on account of the character of the handwriting, the many erasures and interlineations in them, and the confused manner in which the proceedings of the inferior courts are stated, the court deems it proper to give notice that, hereafter, the 29th section of the first article of the act concerning costs (R. C. 1845, p. 246,) will be strictly enforced.

INDEX.

ABANDONMENT.

See LANDS AND LAND TITLES, 3, 4, 5, 6.

ABATEMENT.

See ATTACHMENT, 1.

ACCOUNT.

See MORTGAGE, 11.

1. Where there are mutual running accounts, and the last item on the credit side is within the period which would be a bar by the statute of limitations, the whole account is saved from the operation of the statute. *Penn v. Watson*, 13.
2. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, were held inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Ib.*
3. In this state, a plaintiff's book of original entries, kept by himself, is not admissible evidence in support of a demand for goods sold and delivered, with or without his suppletory oath. *Hissrick v. McPherson*, 310.
4. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune v. Hull*, 596.

ACKNOWLEDGMENT.

1. The mere addition of the words, "*and relinquishes her dower*," in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin v. Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins v. Carter*, 463.
2. The certificate of acknowledgment to a deed executed in Kentucky in 1829, ran in the name of J. B., clerk of the county court, but was signed at the foot, "J. B., by J. J. A., deputy clerk." Held sufficient. *Gibbons v. Gentry*, 468.
3. The omission of the officer taking the acknowledgment of a mortgage to certify to the personal identity of the grantor, can only be taken advantage of by a subsequent purchaser for a valuable consideration. *Chouteau v. Burlando*, 482.

ACTION ON THE CASE.

1. Where ministerial officers are required to exercise their judgment, they

ACTION ON THE CASE—(*Continued.*)

are not liable for any errors, in the absence of malice. So, a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed v. Conway*, 22.

2. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully and negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs v. Miller*, 391.

ACTS OF ASSEMBLY.

See STATUTES.

ADMINISTRATION.

1. The provision in the administration law of 1845, that an administrator shall not be an incompetent witness for the estate, as to facts which occurred before his qualification, does not apply when he is at the same time a distributee. *Penn v. Watson*, 13.
2. Under the new practice act, the distributee of a solvent estate is not a competent witness for the estate. *Ib.*
3. The distributee of a solvent estate is a competent witness for the estate, under the new practice. (*Penn v. Watson*, overruled.) *Stein v. Weidman*, 17.
4. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy of the law does not require to be kept sacred and secret between husband and wife during marriage. *Ib.*
5. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*
6. The allowances made to administrators in their annual and final settlements have the effect of judgments, and are conclusive between the parties at law; but may be set aside in equity upon a proper showing. *Jones v. Brinker*, 87.
7. A statement that the administrator *illegally* procured allowances in his favor does not make out a case for equitable relief. *Ib.*
8. The statute of limitations runs in favor of an administrator against the distributee of an estate from the date of the final settlement and order of distribution. *The State v. Blackwell*, 97.
9. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a

ADMINISTRATION—(*Continued.*)

- single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State v. Ruggles*, 99.
10. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
 11. If an executor pays a legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. *Ib.*
 12. In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. *Ib.*
 13. But if the executor had at first enough to pay all the legacies, and by his subsequent wasting of the assets they became deficient, in that case, such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence. *Ib.*
 14. A legatee suing on an administration bond for a legacy must show the same facts that he would be compelled to show had he sued the administrator by bill in equity. *Ib.*
 15. The same principle applies to an administrator who voluntarily pays illegal taxes upon the estate of his intestate, as to a person acting for himself. Neither can maintain an action to recover back. *Christy v. City of St. Louis*, 143.
 16. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury v. McIntosh*, 278.
 17. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness v. Green's Adm'r*, 316.
 18. Under our administration law classifying demands, (R. C. 1845, sec. 1, art. 4,) only judgments of our own state can be placed in the fourth class. Judgments of sister states have no preference over simple contract debts. *Ib.*
 19. As by our statute, the letters of an administrator are revoked by the fact of his becoming a non-resident, he cannot afterwards be made a party to a suit in his administrative capacity. *Chouteau v. Burlando*, 482.
 20. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton v. Keeton*, 530.

ADMINISTRATION—(Continued.)

21. Facts stated, which, in the opinion of the court, showed fraud in a sale by an administrator of slaves belonging to the estate of his intestate. *Ib.*
22. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf v. Robinson*, 459.
23. The title of the purchaser at an administration sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Ib.*

ADULTERY.

See INDICTMENT, 5.

AFFIDAVIT.

1. The supreme court will not reverse a case because the plaintiff did not swear anew to his petition after an amendment in the caption. *Matthews v. Rountree*, 282.

AGREEMENT.

See GUARANTY. As to recoupment of damages upon a contract of sale, see DAMAGES, 5. SPECIFIC PERFORMANCE. SALE.

1. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one half A.'s interest in the metals and ores" that might be obtained. *Held*, A.'s interest in the outfit did not pass. *Phillips v. Jones' Adm'r*, 67.
2. It is optional with a party who has made a parol contract to convey land to avail himself of the plea of the statute of frauds or not. (*McGowen v. West*, 7 Mo. Rep. 570, affirmed.) *Farrar v. Patton*, 81.
3. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
4. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought to be enforced. *Ib.*
5. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke v. Leewright*, 85.
6. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
7. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of

AGREEMENT—(Continued.)

- title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston v. Dugan*, 102.
8. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
 9. A contract to convey to A. a quarter section of land, to be selected by him, cannot be assigned to B. so as to entitle him to make a selection. *McQueen v. Chouteau's Heirs*, 222.
 10. A promise in writing to pay a specified sum to trustees to be appointed by a certain convention, is a valid note, within the meaning of the first section of the act concerning "bonds and notes," (R. C. 1845,) and imports a consideration. *Caples v. Branham*, 244.
 11. Under our act, (R. C. 1845,) a party may proceed against a boat by name for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip. *Taylor v. Steamboat Robt. Campbell*, 254.
 12. One partner may sue for the breach of a contract made by him in his own name, although it was made for the benefit of the firm. *Ib.*
 13. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might go to the jury, upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Ib.*
 14. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*
 15. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis. *Ib.*
 16. *Collier v. Swinney*, 16 Mo. Rep. 484, affirmed.
 17. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill v. Ragan*, 451.
 18. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling v. Ball & Chapin*, 563.

AMENDMENT.

See PLEADING, 1.

1. The insertion of an "&" between the christian and sir-name of a plaintiff in the caption of a petition, may be summarily amended. *Hite v. Hunton*, 286.
2. The supreme court will not revise the discretion exercised by inferior courts in allowing amendments, unless it clearly appears that the dis-

AMENDMENT—(Continued.)

cretion has been abused to the prejudice of the party. *Cullum v. Cundiff*, 522.

APPEAL.

See WRIT OF ERROR.

1. After an appeal has once been granted, the power of the inferior court over the subject is exhausted. If the appeal is dismissed, or if from any cause, the party loses the benefit of it, he cannot take another appeal, but must resort to his writ of error. *Brill v. Meek*, 359.
2. In a partition suit, judgment that partition be made is an interlocutory judgment from which no appeal lies. *McMurtry v. Glascock*, 432.
3. No appeal or writ of error lies from a voluntary non-suit taken upon the refusal of the inferior court to strike out an answer as insufficient. *Louisiana & Middletown Plank Road Co. v. Mitchell*, 432.
4. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury v. McIntosh*, 278.

ASSIGNMENT.

See PROMISSORY NOTES, 1. As to assignment of Stock, see CORPORATIONS, 3. BONDS AND NOTES, 13, 14.

1. A contract to convey to A. a quarter section of land, to be selected by him, cannot be assigned to B. so as to entitle him to make a selection. *McQueen v. Chouteau*, 222.
2. In an action by the general assignees of an insolvent, to recover a debt due the assignor, the defendant was allowed to set up as an equitable defence or set-off the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment. *Morrow's Assignees v. Bright*, 298.
3. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers v. Heath's Adm'r*, 319.
4. A particular assignment for value by husband and wife of the wife's reversionary interest in a chattel, expectant on the death of a tenant for life, does not defeat the wife's right of survivorship, where the husband dies before the death of the tenant for life. The assignment, in such a case, does not operate as a constructive reduction into possession by the husband. *Wood v. Simmons*, 363.
5. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren v. Relfe*, 455.
6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Gale v. Mensing*, 461.

ASSIGNMENT—(Continued.)

7. Neither an original general assignee nor one substituted by the appointment of the court, under the statute, (R. C. 1845,) in possession of chattels claimed under the assignment, will be protected from suit by a party claiming the same chattels under a conveyance from the assignor previous to the assignment, on the ground of being an officer or quasi officer of court. *Page & Bacon v. Gardner*, 507.
8. A general conveyance of all debts that "may be due" to the grantor, at a specified subsequent date, without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts (or the money collected upon them) contracted, though not due at the date of the conveyance. *Ib.*
9. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching creditors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball v. Donald*, 577. *Engler v. Rice*, 583.
10. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning "bonds and notes," (R. C. 1845.) *Smith v. Ashby*, 354.

ASSUMPSIT.

1. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston v. Dugan*, 102.
2. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
3. A party cannot maintain an action to recover back illegal taxes paid by him without objection. The same principle applies to an administrator who pays illegal taxes upon the estate of his intestate. Nor can an administrator recover back illegal taxes voluntarily paid by a former administrator. *Christy's Adm'r v. City of St. Louis*, 143.
4. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill v. Ragan*, 451.
5. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield v. Branson*, 301.
6. Where a plaintiff, in a suit for wages, proves services, but fails to prove their value, an instruction that he cannot recover is erroneous, as he is entitled to a nominal sum at least. *Owen v. O'Reilly*, 603.

ATTACHMENT.

1. Suit by attachment on a note given by B. F. O. & Co., was commenced before a justice against B. F. O. & — O. The affidavit alleged that B. F. O. & — O. (composing the firm of B. F. O. & Co.,) were non-residents. The firm of B. F. O. & Co. was really composed of B. F. O. & R. S. Upon appeal to the circuit court, the suit was dismissed as to — O. Before or after this dismissal, (it did not appear which,) a plea in abatement was filed, denying the non-residence of B. F. O. & — O. *Held*, the only issue to be tried upon the plea was, whether B. F. O. was a non-resident. *Moore v. Otis*, 153.
2. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching creditors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball v. Donald*, 577. *Engler v. Rice*, 583.

AUTHENTICATION.

See WILL, 3.

BAILMENT.

See CARRIER. BOATS AND VESSELS.

BILL OF EXCEPTIONS.

1. Judgment affirmed for want of bill of exceptions, the cause having originated before a justice, and nothing appearing in the record to warrant a disturbance of the judgment. *Elliott v. Pogue*, 263.
2. Bill of exceptions stricken out, because not filed at the term at which the trial took place, no reason for the delay appearing on the record. *Ruble v. Thomasson*, 263.

BILL OF REVIEW.

See PRACTICE IN CHANCERY.

BILLS OF EXCHANGE AND NEGOTIABLE NOTES.

1. A party who puts his name upon the back of a negotiable note, to which, at the time, he is not a party, is *prima facie* liable as maker; and although, as between parties entitled to look into the real transaction, it may be shown that he signed as endorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice and for value. *Schneider v. Schiffman*, 571.
2. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (Scott, J., dissenting.) *Wheeler v. Barret*, 573.
3. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching credi-

BILLS OF EXCHANGE AND NEGOTIABLE NOTES—(Continued.)

- tors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball v. Donald* 577. *Engler v. Rice*, 583.
4. Possession by the endorser of a dishonored bill of exchange is evidence sufficient to enable him to maintain an action thereon, though at the same time there appears upon the bill an endorsement in full from him to another party. *Page & Bacon v. Lathrop*, 589.
 5. Although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. (SCOTT, J., dissenting.) *Ib.*
 6. Can a payee, who receives a bill, drawn by an agent in the name of his principal under a written authority shown to him at the time, afterwards charge the agent as principal, as having drawn without authority? *Ib.*

BOATS AND VESSELS.

1. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert v. Rider & Allen*, 146.
2. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
3. Under our act, (R. C. 1845,) a party may proceed against a boat by name, for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip. *Taylor v. Steamboat Robt. Campbell*, 254.
4. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might go to the jury upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Ib.*
5. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*
6. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis. *Ib.*
7. *Collter v. Swinney*, (16 Mo. Rep. 484,) affirmed.

BOATS AND VESSELS—(Continued.)

8. Upon the question of negligence of a boat, evidence of the statements of the pilot is not admissible. *Brady v. Steamboat Highland Mary*, 264.
9. It is not *prima facie* within the scope of the employment of a steamboat or the authority of her officers, to carry specie for hire; and in order to hold the boat or her owners liable for the loss of money entrusted to the clerk by a passenger, a known and established *usage* for steamboats to carry money for hire on account of the owners, must be shown. (*Chouteau & Valle v. Steamboat St. Anthony*, 16 Mo. Rep., affirmed.) *Whitmore v. Steamboat Caroline*, 513.
10. The implied undertaking of a common carrier to carry the baggage of passengers, does not include more money than a reasonable amount to pay traveling expenses. *Ib.*
11. Evidence of a custom by boats to carry bank bills for customers to conciliate their patronage, is insufficient to establish a custom of carrying bank bills for hire. *Chouteau & Valle v. Steamboat St. Anthony*, 519.
12. The principle that a bailee, who gratuitously undertakes to do an act, is liable for negligence in doing it, is not applicable to steamboats. *Ib.*

BONDS AND NOTES.

See PROMISSORY NOTES.

1. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State v. Ruggles*, 99.
2. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
3. A legatee suing on an administration bond, for a legacy, must show the same facts that he would be compelled to show, had he sued the administrator by bill in equity. *Ib.*
4. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note within the meaning of the first section of the act concerning bonds and notes, (R. C. 1845,) and imports a consideration. *Caples v. Branham*, 244.
5. It is not necessary that the payees should be designated when the promise is made, if they are designated before suit brought. *Ib.*
6. In declaring upon such an instrument, it is not necessary to set out a consideration in the declaration. *Ib.*
7. One instalment of a note due by instalments may be recovered before the others are due; and under the new practice, it would probably not be material whether the amount is sought to be recovered as a debt or damages. *Ib.*
8. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable in an action upon the note, upon proof of his want of authority. *Byars v. Doores*, 284.

BONDS AND NOTES—(Continued.)

9. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposited with him a chattel as a pledge for his indemnity, and thereupon, the note was given, merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan v. Moss*, 297.
10. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State v. Muir & Ritter*, 303.
11. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*
12. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescission of the contract in a proceeding to which he was not a party. *Powers v. Heath's Adm'r*, 319.
13. The failure of the assignee of a note not negotiable under the statute to bring suit against the maker to the first term of the court, or first law day of the justice having jurisdiction, without excuse, discharges the assignor. *Stone v. Corbett*, 350.
14. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Ib.*
15. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smith v. Ashby*, 354.
16. In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal and conversion of *fixtures*, without his knowledge or consent, after the contract of sale and before a formal transfer of the land, and the execution of the bonds. *Grand Lodge of Masons v. Knox*, 433.
17. It is a good defence to a note given for the price of land conveyed by deed containing a covenant of warranty, that the grantor had no title. *Hobbs v. Drewell*, 450.

BOOKS OF ACCOUNT.

1. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, *were held* inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Penn v. Watson*, 13.
2. A plaintiff's book of original entries, kept by himself, not evidence. *Hissrick v. McPherson*, 310.

CARONDELET.

1. The title of Carondelet to common, under the act of June 13, 1812, may be established without a survey, by proof of *user* prior to December 20, 1803. *City of Carondelet v. McPherson*, 192.
2. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists. *Ib.*
3. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *Ib.*

CARRIER.

See BOATS AND VESSELS.

CHARITY.

1. A court will not interfere to establish the validity of a charity in a will, depending upon a contingency which has not arisen and may never arise. *The State v. Prewett*, 165.

CHOUTEAU SPRING COMPANY.

See CORPORATIONS, 3.

CIRCUIT ATTORNEY.

1. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State v. Rich*, 393.

COMMITMENT.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpoena duces tecum*. *Ex parte Mallinkrodt*, 493.

COMMON.

See CARONDELET.

COMMUNITY.

1. Neither by the Spanish law nor by the custom of Paris did a royal grant or gift to either of two spouses enter into the community. *Wilkinson v. The American Iron Mountain Co.*, 122.
2. The same rule applied to concessions in Louisiana, unless when made upon a consideration which was a burden on the community. *Ib.*
3. A marriage contract, entered into at Ste. Genevieve in 1797, contained this clause: "The intended consorts shall be in community as to all property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, &c. *Held*, the words "according to and in conformity with the custom of this place" referred to the community, and not to the acquisition of property, and the clause did not have the effect to bring into the community property which would otherwise not be embraced by it. *Ib.*

COMMUNITY—(Continued.)

4. The operation of a clause in a marriage contract, *establishing* a community cannot be enlarged by a subsequent clause providing for a *renunciation* of it. *Ib.*

CONFIRMATION.

See LANDS AND LAND TITLES, 10.

CONSIDERATION.

See PROMISSORY NOTES, 3.

1. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston v. Dugan*, 102.
2. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
3. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note, within the meaning of the first section of the act concerning bonds and notes, (R. C. 1845,) and imports a consideration. *Caples v. Branham*, 244.
4. It is not necessary that the payees should be designated when the promise is made, if they are designated before suit brought. *Ib.*
5. In declaring upon such an instrument, it is not necessary to set out a consideration in the declaration. *Ib.*
6. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield v. Branson*, 301.
7. Smallness of consideration in a sheriff's deed, of itself, under the circumstances of the case, *held* not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau v. Nuckolls*, 442.
8. It is a good defence to a note given for the purchase money of land conveyed by a deed containing a covenant of general warranty, that the grantor had no title. *Hobets v. Drewell*, 450.

CONSTABLE.

1. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State v. Muir & Ritter*, 303.
2. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*

CONSTITUTION.

1. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State v. Amba*, 214.
2. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*

CONSTITUTION—(Continued.)

3. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull v. Dowdall*, 359.
4. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State v. Rich*, 393.
5. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *Ib.*
6. The law prohibiting the sale of liquor (R. C. 1845,) without a license is constitutional. *State v. Searcy*, 489.
7. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness v. Green's Adm'r*, 316.

CONTEMPT.

See NOTARY PUBLIC.

CONTRACT.

See AGREEMENT. SALE. As to recoupment of damages on a contract of sale, see DAMAGES, 5.

CONVEYANCE.

See SHERIFF'S DEED. EMBLEMENTS. USES AND TRUSTS, 7. ACKNOWLEDGMENT.

1. A conveyance of all the grantor's "right, title and interest" in a tract of land to which he had the legal title, but which he had previously made a parol contract to convey to his father, since deceased, was held to pass only his interest as *heir* of his father. *Farrar v. Patton*, 81.
2. An unrecorded deed is good against a judgment, if recorded before an execution sale under the judgment. (*Davis v. Ownsby*, 14 Mo. Rep. 170, affirmed. *Scott, J.*, dissenting.) *Valentine v. Havener*, 133.
3. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider v. Stahr*, 269.
4. Where a minor *feme covert* joins in a mortgage of her real estate, she may plead infancy during minority in a suit to foreclose. *Ib.*
5. A conveyance by a trustee passes the legal title, although he may be guilty of a breach of trust. *Gale v. Mensing*, 461.
6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Ib.*
7. The mere addition of the words, "and relinquishes her dower," in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin v. Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins v. Carter*, 465.
8. A general conveyance of all debts that "may be due" to the grantor, at a specified subsequent date, without a schedule, passes to the grantee

CONVEYANCE—(Continued.)

such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts (or the money collected upon them) contracted; though not *due* at the date of the conveyance. *Page & Bacon v. Gardner*, 507.

9. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, verbally sold to the grantee; this being an *interest in land* within the statute of frauds. *McIlvaine v. Harris*, 457.

CORPORATIONS.

1. The president is the proper party upon whom to serve process against a corporation, and may appear and confess a judgment for the corporation. *Chamberlin v. The Mammoth Mining Co.*, 96.
2. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r v. City of St. Louis*, 143.
3. The charter of an incorporated company provided that the stock might be "transferred on the books of the company." The company was authorized "to regulate the transfer of stock" by by-laws. A provision in the charter authorized the company, in certain cases, to make assessments on "*stockholders*," beyond their shares of stock. *Held*: That no such assessment could be made on a party after he had ceased to be a member, by a transfer of his stock; that the power "to regulate the transfer" did not include the power to *restrain* transfers, or prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them; and that the company could not prevent a party from selling his stock even to an insolvent person; that an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws. *Chouteau Spring Co. v. Harris*, 382.

COUNTIES.

1. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *State v. Rich*, 393.

COURTS.

See JURISDICTION.

COVENANT.

1. The assignee of a claim for damages upon a broken covenant of seizin must, under the new practice, sue in his own name. *Vandoren v. Relfe*, 455.

CRIMES AND PUNISHMENTS.

See INDICTMENT.

1. A party taking property under the direction of another, to whom he believed it to belong, is not guilty of larceny. *State v. Matthews*, 55.
2. Altering the mark of an animal is not larceny under the statute, unless done with the intention to steal or convert. *Ib.*
3. An indictment of a married man for lewdly and lasciviously abiding and cohabiting with a female, under the second clause of section 8 of article 8 of the act concerning "Crimes and Punishments," (R. C. 1845,) must state that the parties lewdly and lasciviously abided and cohabited *with each other*, in the words of the statute. *State v. Byron*, 211.
4. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State v. Ambs*, 214.
5. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
6. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*
7. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler v. Chapman*, 249.
8. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Ib.*
9. Possession of stolen goods recently after the larceny is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances. *Ib.*
10. An indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the third specification of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) is good, although it does not state whether they were married or unmarried. *State v. Bess*, 419. *State v. Wilhtight*, 422.
11. Under our statute, an indictment for murder in the first degree must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly. *State v. Jones*, 58.
12. An indictment for murder, which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and

CRIMES AND PUNISHMENTS—(*Continued.*)

there, in and upon the left side of the belly and also in and upon the right shoulder, one mortal wound," &c., is bad. *Ib.*

13. The part of the body where the wound was inflicted must be set forth with certainty. *Ib.*
14. Provocation is a question of law. (*State v. Dunn*, 18 Mo. Rep., affirmed.) *Ib.*
15. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *State v. Upton*, 397.

CUSTOM OF PARIS.

See COMMUNITY.

DAMAGES.

See BONDS AND NOTES, 1, 2. TRESPASS, 4. ADMINISTRATION, 9, 10.

1. Under the charter of the Hannibal and St. Joseph railroad company, (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal & St. Joseph Railroad Co. v. Morton*, 70.
2. Where a party files a bill in equity for the specific performance of a contract for the conveyance of land, knowing at the time that it is not in the power of the defendant specifically to perform the contract, the court will not, in ordinary cases, decree to him compensation in damages, but will leave him to his remedy at law for a breach of the contract. *McQueen v. Chouteau's Heirs*, 222.
3. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler v. Chapman*, 249.
4. The supreme court will not reverse a judgment for excessive damages unless in a very clear case. *Woodson v. Scott*, 272.
5. In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal and conversion of fixtures, without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds. *Grand Lodge of Masons v. Knox*, 433.
6. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren v. Relfe*, 455.
7. A case where the supreme court refused to reverse a judgment for excessive damages. *Barth v. Merritt*, 567.
8. Where a plaintiff, in a suit for wages, proves services, but fails to prove their value, an instruction that he cannot recover is erroneous, as he is entitled to a nominal sum at least. *Owen v. O'Reilly*, 603.

DECREE.

See DIVORCE.

1. In this state, a decree against infants, for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given them after coming of age to show cause against it. *Scott, J., dissenting. Creath v. Smith & Atkins*, 113.
2. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf v. Robinson*, 459.

DEED.

See CONVEYANCE.

DEED OF TRUST.

See MORTGAGES, 16.

DEPOSITIONS.

See NOTARY PUBLIC.

DESCRIPTION.

See WILL, 2.

DIVORCE.

1. The provision in the act regulating practice in chancery, (R. C. 1845,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree for a divorce. *Scott, J., dissenting. Smith v. Smith*, 166.
2. Bill for a divorce. It appeared from the record that, after a decree nisi, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver v. Oliver*, 261.
3. Upon a sentence of divorce, a wife becomes entitled to all choses in action not previously reduced into possession by the husband, as by survivorship upon the death of the husband. *Wood v. Simmons*, 363.

DOWER.

1. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring v. Duhring*, 174.

EJECTMENT

1. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of a merely equitable defence. *Kennedy v. Daniels*, 104.
2. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman v. Johnson*, 108.
3. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*
4. Under the new practice, a party who relies upon facts which would

EJECTMENT—(Continued.)

- constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would formerly have been necessary in a bill in chancery. *Ib.*
5. The mere statement in an answer that the defendant's entry was prior to the entry upon which the plaintiff's patent issued, is no ground of equitable relief. *Ib.*
 6. The only effect of a failure by a mortgagee to make a subsequent incumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine v. Haven*, 36.
 7. Under execution upon a judgment of a state court, real estate was sold to A., being at the time subject to the lien of a judgment of the United States circuit court. After the lien of the latter judgment expired, execution upon it issued, under which the same real estate was sold to B. Held, A. had the better title. *Chouteau v. Nuckolls*, 442.

EMBLEMENTS.

1. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, verbally sold to the grantee; this being an interest in land within the statute of frauds. *McIlvatne v. Harris*, 457.

ESTOPPEL.

1. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *City of Carondelet v. McPherson*, 192.

EVIDENCE.

See **JURORS**, 1, 2. **AGREEMENT**, 17.

1. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, were held inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Penn v. Watson*, 13.
2. The provision in the administration law of 1845, that an administrator shall not be an incompetent witness for the estate, as to facts which occurred before his qualification, does not apply when he is at the same time a distributee. *Ib.*
3. Under the new practice act, the distributee of a solvent estate is not a competent witness for the estate. *Ib.*
4. The distributee of a solvent estate is a competent witness for the estate, under the new practice. (*Penn v. Watson*, overruled.) *Stein v. Weidman*, 17.
5. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy

EVIDENCE—(Continued.)

- of the law does not require to be kept sacred and secret between husband and wife during marriage. *Ib.*
6. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*
 7. The fact that the claimant of a lot applied for and obtained in 1808, the benefit of an act for the relief of insolvent debtors, and did not include the lot in his inventory, which was required to be sworn to as a full and perfect discovery of all his real and personal estate, together with the fact that he had previously removed the machinery of a mill which he had erected upon it, and the occupation of which had been his only possession or evidence of title, is evidence to go to a jury of an abandonment. *Barada v. Blumenthal*, 162.
 8. A will described land devised as the "south-east and south-west quarters of section 4, in township 60, range 38, in Holt county, Missouri." The devisee of the south-west quarter was to have access to the "Big Spring." *Held*, parol evidence that the corresponding quarter sections of township *fifty-nine*, in the same range and county, were intended to be devised, was admissible, it appearing that the "Big Spring" was upon the south-east quarter of section 4, in township fifty-nine, and that the testator never owned or claimed any land in section 4 of township 60. *Riggs v. Myers*, 239.
 9. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Fackler v. Chapman*, 249.
 10. Possession of stolen goods recently after the larceny is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances. *Ib.*
 11. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might go to the jury upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Taylor v. Steamboat Robt. Campbell*, 254.
 12. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*
 13. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis. *Ib.*

EVIDENCE—(Continued.)

14. Upon the question of negligence of a boat, evidence of the statements of the pilot is not admissible. *Ready v. Steamboat Highland Mary*, 264.
15. In this state, a plaintiff's book of original entries, kept by himself, is not admissible evidence in support of a demand for goods sold and delivered, with or without his suppletory oath. *Hissrick v. McPherson*, 310.
16. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler v. Servoss*, 6 Mo. Rep. 24, affirmed. *Dowd v. Winters*, 361.
17. Jurors are the exclusive judges of the weight of evidence. *State v. Upton*, 397.
18. A party objecting to the admission of a record in evidence must specify his objections. *State v. Gates*, 400.
19. One witness swearing that he saw two men on horseback meet in a road, and that they wheeled as they passed and had an angry conversation, and another witness, who also saw them meet, swearing that he did not see them wheel, an instruction to the jury that affirmative must prevail over negative testimony was held inapplicable and erroneous. *Ib.*
20. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, verbally sold to the grantee; this being an interest in land within the statute of frauds. *McIlvaine v. Harris*, 457.
21. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle v. Nichols*, 326.
22. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State v. Baker*, 338.

EXECUTION.

See PRACTICE, 3. CONSTABLE, 1, 2.

1. A man may be the "head of a family," within the meaning of the execution exemption act, though he has neither wife nor children. *Wade v. Jones*, 75.
2. As to the regularity of an execution, see *Chamberlin v. The Mammoth Mining Co.*, 96.
3. The act of March 5, 1849, exempting certain property of wives from

EXECUTION—(Continued.)

the debts of their husbands, only applies where the debts are contracted *after the passage of the act* and before the wife comes into possession of the property. *Cunningham v. Gray*, 170. *Tally v. Thompson*, 277.

4. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider v. Stathr*, 269.
5. The husband's estate during the marriage in his wife's realty, or his tenancy by the curtesy, may however, it would seem, be subjected to sale for his debts. *Ib.*
6. It is no ground for enjoining a sale under execution that the plaintiff was dead when the execution issued. *Tally v. Thompson*, 277.
7. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.* *Hobain v. Murphy*, 447. *Hobeta v. Drewell*, 450.
8. The omission to give the required notice, even in those cases where it is necessary, would not *ipso facto* render the sale void, but the party injured would have relief according to circumstances. If the party whose duty it was to give the notice had acquired the title, the sale might be set aside in a direct proceeding, and the property restored. If a fair purchaser had paid the price and received a conveyance, the remedy would be confined to pecuniary damages against the wrong doer. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

FLOUR, (INSPECTION OF.)

See ST. LOUIS.

FRANCHISE.

1. An injunction does not lie to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James v. Dixon*, 79.

FRAUDULENT CONVEYANCE.

See ASSIGNMENT, 6, or CONVEYANCE, 6.

1. G. in Kentucky, in 1829, executed a deed for slaves to trustees, to be held, with their increase, *for the benefit of G. and wife during their lives*, and after their deaths to be divided among their children. Held, that the deed was not void upon its own face under the laws of Kentucky in force when it was executed. *Gibbons v. Gentry*, 468.
2. Under the first section of the act concerning "fraudulent conveyances," (R. C. 1845,) a deed of a stock of goods to a trustee, for the benefit of creditors, which, on its face, reserves to the grantor the right to continue to sell the goods in the usual course of his business until default made in the payment of the debts intended to be secured, is

FRAUDULENT CONVEYANCE—(Continued.)

as a matter of law, void against existing and subsequent creditors and purchasers. *Brooks v. Wimer*, 503.

FRAUDS AND PERJURIES.

See ADMINISTRATION, 10.

1. It is optional with a party who has made a parol contract to convey land to avail himself of the plea of the statute of frauds or not. (*McGowen v. West*, 7 Mo. Rep. 570, affirmed.) *Farrar v. Patton*, 81.
2. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
3. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought to be enforced. *Ib.*
4. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke v. Leewright*, 85.
5. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
6. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, verbally sold to the grantee; this being an interest in land within the statute of frauds. *McIlvaine v. Harris*, 457.
7. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by fraud, without stating the facts which constitute the fraud. *Edgell v. Stigerson*, 494.
8. A judgment obtained by fraud is void. *Ib.*
9. Facts stated, which, in the opinion of the court, showed fraud in a sale by an administrator of slaves belonging to the estate of his intestate. *Keeton v. Keeton*, 530.
10. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them at the time agreed upon. He must, when he buys, intend never to pay for them, to prevent the title from passing; and this is a question for a jury. *Bidault v. Wales*, 546.
11. To constitute a delivery, within the meaning of the statute of frauds, there must be not only a change of the actual possession, but a change of the civil possession, which is a holding of the thing, with the design of keeping it as owner; and this is a question of fact for a jury. *Cunningham v. Ashbrook*, 553.
12. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling v. Ball & Chapin*, 563.

GRAND JURY.

See JURORS.

GROCERIES AND DRAM-SHOPS.

1. A physician is indictable for selling liquor in less quantity than a quart without a license, unless he sells it in good faith as a medicine upon his professional judgment of its necessity. *State v. Larrimore*, 425.
2. The law prohibiting the sale of liquor (R. C. 1845,) without a license is constitutional. *State v. Searcy*, 489.
3. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State v. Ambs*, 214.
4. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
5. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*

GUARANTY.

1. D. sold to B. some lard and agreed in writing as follows: "I am to ship the above lard to Messrs. F. & F., New York, for sale, and to value on them at ninety days from date of delivery of said lard, for full cost of same in favor of said B.; and above lard to be sold to meet payment of the aforesaid drafts." On the same day, C. executed to D. the following writing: "Mr. D. having this day sold to Mr. B. 417 tierces of lard, upon terms agreed upon by them, and the said D. having advanced drafts to full amount of cost of said lard, I hereby promise and agree to pay to the said D., or his order, on demand, any amount of reclamation he may have against said B., arising from sales of said lard." The lard was by D. shipped to F. & F., but by an arrangement between them and B., without the knowledge of D., was not sold to meet the drafts, which were by F. & F. otherwise provided for. Afterwards, the lard was sold for less than the amount of the drafts. D. assigned C.'s agreement to F. & F., who bring suit upon it for the reclamation. *Held*, C.'s writing was a guaranty, and to be construed in reference to to the contract between D. & B.; and the guarantor was discharged by the failure to sell the lard within ninety days. (GAMBLE, J., dissenting, holding that C.'s writing was an original undertaking, and could only be discharged by some act of D.) *Fisher & Fellows v. Cutter*, 206.

HABEAS CORPUS.

As to *habeas corpus* in case of imprisonment for contempt, see NOTARY PUBLIC.

HANNIBAL AND ST. JOSEPH RAILROAD CO.

See WRIT OF ERROR, 1.

HUSBAND AND WIFE.

See MARRIAGE CONTRACT. COMMUNITY. DIVORCE.

1. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy of

HUSBAND AND WIFE—(Continued.)

- the law does not require to be kept sacred and secret between husband and wife during marriage. *Stein v. Weidman* 17.
2. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*
 3. The act of March 5, 1849, exempting certain property of wives from the debts of their husbands, only applies where the debts are contracted after the passage of the act and before the wife comes into possession of the property. *Cunningham v. Gray*, 170. *Tally v. Thompson*, 277.
 4. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring v. Duhring*, 174.
 5. A husband, in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Robinson v. Rice*, 229.
 6. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider v. Stathr*, 269.
 - 7 The husband's estate during the marriage, or his tenancy by the curtesy, may however, it would seem, be subjected to sale for his wife's debts. *Ib.*
 8. Upon a sentence of divorce, a wife becomes entitled to all choses in action not previously reduced into possession by the husband, as by survivorship upon the death of the husband. *Wood v. Simmons*, 363.
 9. A particular assignment for value by husband and wife of the wife's reversionary interest in a chattel, expectant on the death of a tenant for life, does not defeat the wife's right of survivorship, where the husband dies before the death of the tenant for life. The assignment, in such a case, does not operate as a constructive reduction into possession by the husband. *Ib.*
 10. The mere addition of the words, "and relinquishes her dower," in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chawtn v. Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins v. Carter*, 465.

INCUMBRANCE.

1. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg v. Heitcamp*, 569.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

1. Under our statute, an indictment for murder in the first degree must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other

INDICTMENT—(*Continued.*)

- kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly. *State v. Jones*, 58.
2. An indictment for murder, which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and there, in and upon the left side of the belly and also in and upon the right shoulder, one mortal wound," &c., is bad. *Ib.*
 3. The part of the body where the wound was inflicted must be set forth with certainty. *Ib.*
 4. Provocation is a question of law. (*State v. Dunn*, 18 Mo. Rep. affirmed.) *Ib.*
 5. An indictment of a married man for lewdly and lasciviously abiding and cohabiting with a female, under the second clause of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) must state that the parties lewdly and lasciviously abided and cohabited *with each other*, in the words of the statute. *State v. Byron*, 210.
 6. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State v. Baker*, 338.
 7. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *State v. Rich*, 393.
 8. An indictment under the thirtieth section of the act concerning "school lands," (R. C. 1845,) which charges the defendant with committing "waste, trespass and other injury," &c., "by cutting down and carrying away timber," &c., is not bad for duplicity. *State v. Myers*, 409.
 9. An indictment upon one section of a statute need not negative an exception in a subsequent section. *State v. Shifflett*, 415.
 10. An indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the third specification of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) is good, although it does not state whether they were married or unmarried. *State v. Bess*, 419. *State v. Wilhtight*, 422.
 11. An indictment under the 57th section of article one of the act concerning "roads and highways," (R. C. 1845,) must distinctly charge that the fork of the road at which the defendant failed to place a finger board, is within the road district of which he was overseer; and to constitute an offence under this section, the roads forming the fork must not terminate at the same point. *State v. Tuley*, 422.
 12. "The county aforesaid" in an indictment not a sufficient venue, where two counties have been previously named. *State v. McCracken*, 411.

INFANT.

- In this state, a decree against infants for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given to the infants after coming of age to show cause against the decree. (Scott, J., dissenting.) *Creath v. Smith & Atkins*, 113.
2. An infant cannot execute a power of appointment coupled with an interest. *Thompson & Wife v. Lyon*, 155.
 3. The disability of infancy cannot be dispensed with by the instrument creating the power. *Ib.*
 4. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Ib.*
 5. A court of equity, however, will not, in such a case, interfere against a purchaser for a valuable consideration without notice. *Ib.*
 6. Where a minor *feme covert* joins in a mortgage of her real estate, she may plead infancy *during minority* in a suit to foreclose. *Schneider v. Stahr*, 269.

INJUNCTION.

1. An injunction does not lie to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James v. Dixon*, 79.
2. The illegal exemption by city ordinance of the property of one tax payer from assessment for a special sewer tax, will not authorize an injunction to restrain the city from collecting the assessment against another tax payer, not exceeding the amount which the city was authorized to impose; certainly not, unless it appears that, upon payment of the assessment sought to be enjoined, the plaintiff will have paid more than would have been his proportion had it not been for the exemption. *Page v. City of St. Louis*, 136.
3. It is no ground for enjoining a sale under execution that the plaintiff was dead when the execution issued. *Tally v. Thompson*, 277.

INSOLVENT.

See ASSIGNMENT, 2.

INSPECTION.

See ST. LOUIS.

JUDGMENT.

1. A judgment of conviction in a criminal case cannot be sustained, where the record does not show that the defendant was ever in court until after verdict. *State v. Matthews*, 55.
2. The allowances made to administrators in their annual and final settlements have the effect of judgments, and are conclusive between the parties at law; but may be set aside in equity upon a proper showing. *Jones v. Brinker*, 87.

JUDGMENT—(Continued.)

3. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void. *Bollinger v. Chouteau*, 89.
4. The statutory provision (R. C. 1845) that confessions of judgments before justices of the peace shall be in writing, by its express terms, does not extend to confessions in actions commenced by process. *Chamberlin v. The Mammoth Mining Co.*, 96.
5. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State v. Ruggles*, 99.
6. An unrecorded deed is good against a judgment, if recorded before an execution sale under the judgment. (*Davis v. Ownsby*, 14 Mo. Rep. 170, affirmed. *Scott*, J., dissenting.) *Valentine v. Havener*, 133.
7. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert v. Rider & Allen*, 146.
8. A judgment was rendered in California against a resident of Missouri upon publication. Afterwards, as shown by the record, the defendant appeared by attorney, filed an affidavit and asked leave to answer, which was granted on condition of payment of costs, but he failed to answer, when the former judgment was reinstated. *Held*, the judgment was conclusive in this state. *Harbin v. Chiles*, 314.
9. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness v. Green's Adm'r*, 316.
10. Under our administration law classifying demands, (R. C. 1845, sec. 1, art. 4,) only judgments of our own state can be placed in the fourth class. Judgments of sister states have no preference over simple contract debts. *Ib.*
11. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull v. Dowdall*, 359.
12. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Ib.*
13. A judgment rendered in a court of one county, in a cause taken by a second change of venue by consent of parties from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau v. Nuckolls*, 442.
14. Under the act of congress approved July 4, 1840, the liens of judgments

JUDGMENT—(Continued.)

- and decrees rendered in the United States circuit and district courts within each state, continue for the same period as the liens of judgments and decrees of the state courts. *Ib.*
15. The pendency of a writ of error in the supreme court of the United States does not affect the duration of the lien of a judgment of the circuit court. *Ib.*
 16. Under execution upon a judgment of a state court, real estate was sold to A., being at the time subject to the lien of a judgment of the United States circuit court. After the lien of the latter judgment expired, execution upon it issued, under which the same real estate was sold to B. *Held*, A. had the better title. *Ib.*
 17. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud. *Edgell v. Sigerson*, 494.
 18. A judgment obtained by fraud is void. *Ib.*
 19. A circuit court has no power to insert a clause in a judgment, authorizing the party against whom it is rendered to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, a judgment was set aside at the next term, and a new judgment rendered, it was treated as a nullity by the supreme court, and the first judgment reinstated. *Hill v. City of St. Louis*, 584. *Shepard v. City of St. Louis*, 589.
 20. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers v. Heath's Adm'r*, 319.

JUDGMENTS OF SISTER STATES.

See JUDGMENT, 8, 9, 10.

JUDICIAL SALE.

See SALE, 3, 4, 5. ADMINISTRATION, 22, 23.

1. A judgment rendered in a court of one county, in a cause taken by a second change of venue *by consent of parties* from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau v. Nuckolls*, 442.
2. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.* *Hobain v. Murphy*, 447.
3. The omission to give the required notice, even in those cases where it is necessary, would not, *ipso facto* render the sale void, but the party injured would have relief according to circumstances. If the party whose duty it was to give the notice had acquired the title, the sale might be set aside in a direct proceeding, and the property restored. If a fair purchaser had paid the price and received a conveyance, the remedy would be confined to pecuniary damages against the wrong doer. *Ib.*

JURISDICTION.

1. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Stone v. Corbett*, 350.
2. Consent of parties cannot confer jurisdiction. *Ib.*
3. Under the first section of the fourth article of the practice act of 1849, the jurisdiction of courts, in suits where land is the subject of litigation, depends exclusively upon the residence or presence of the parties, and not upon the location of the land. That section repeals the second section of the first article of the act concerning practice in chancery, (R. C. 1845.) *Miller v. Thurmond*, 477.
4. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune v. Hull*, 596.
5. A judgment in a court of one county, in a cause taken by consent from a court of another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau v. Nuckolls*, 442.

JURORS.

1. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle v. Nickolls*, 326.
2. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State v. Baker*, 338.
3. Jurors are the exclusive judges of the weight of evidence. *State v. Upton*, 397.
4. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *Ib.*

JUSTICES' COURTS.

1. The president is the proper party upon whom to serve process against a corporation, and may appear and confess a judgment for the corporation. *Chamberlin v. The Mammoth Mtning Co.*, 96.
2. The statutory provision, (R. C. 1845,) that confessions of judgments before justices of the peace shall be in writing, by its express terms, does not extend to confessions in actions commenced by process. *Ib.*

JUSTICES' COURTS—(Continued.)

3. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff the recovery being limited to the damages for the mere taking of the timber. *Pearson v. Inlow*, 322.
4. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Stone v. Corbett*, 350.
5. A party sued before a justice filed as an off-set an account exceeding the justice's jurisdiction, but attempted to be brought within it by a credit for the amount of the plaintiff's demand. *Held*, this could not be allowed as a set-off. *Almeida v. Sigerson*, 497.
6. In a suit commenced before a justice, an account was filed, the first item of which was "balance from 1851, \$97 90." *Held*, the generality of this item was no sufficient ground for dismissing the suit in the appellate court. *Busch v. Diepenbrock*, 568.
7. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back, on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r v. City of St. Louis*, 143.

LAND COURT, (St. Louis.)

See SALARY, 4.

1. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune v. Hull*, 596.

LANDLORD AND TENANT.

1. Where a tenant disclaims the title of his landlord, and asserts a title in himself, he cannot, when defeated, receive compensation in a court of equity for improvements. *McQueen v. Chouteau's Heirs*, 222.
2. A privilege in a lease to the lessee of doing such *quarrying* on the demised premises as was necessary to carry on his business as a boat builder, *was held* to confer a property in the rock so quarried. (Judge LEONARD dissenting.) *McKee v. Brooks & Meegan*, 526.

LANDS AND LAND TITLES.

See MARRIAGE CONTRACT. COMMUNITY. PUBLIC LANDS, 1. PRACTICE, 36. JURISDICTION, 2.

1. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman v. Johnson*, 108.

LANDS AND LAND TITLES—(Continued.)

2. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*
3. It is settled that no claim was confirmed by the act of June 13, 1812, which had been previously abandoned. *Barada v. Blumenthal*, 162.
4. By abandonment of a lot is meant quitting possession, with the intention that it should no longer be the property of the possessor. *Ib.*
5. Where there is evidence of abandonment, an instruction which leaves that question out of view, is properly refused. *Ib.*
6. The fact that the claimant of a lot applied for and obtained in 1808, the benefit of an act for the relief of insolvent debtors, and did not include the lot in his inventory, which was required to be sworn to as a full and perfect discovery of all his real and personal estate, together with the fact that he had previously removed the machinery of a mill which he had erected upon it, and the occupation of which had been his only possession or evidence of title, is evidence to go to a jury of an abandonment. *Barada v. Blumenthal*, 162.
7. The title of Carondelet to common, under the act of June 13, 1812, may be established without a survey, by proof of user prior to December 20, 1803. *City of Carondelet v. McPherson*, 192.
8. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists. *Ib.*
9. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *City of Carondelet v. McPherson*, 192.
10. A confirmation by the act of congress of March 3, 1807, and a patent is a better legal title than a confirmation by the same act without a patent. *Maguire v. Vice*, 429.

LARCENY.

See CRIMES AND PUNISHMENTS, 1, 2, 7, 8, 9. EVIDENCE, 10.

LEGACY.

1. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State v. Ruggles*, 99.
2. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
3. If an executor pays a legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. *Ib.*

LEGACY—(Continued.)

4. In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. *Ib.*
5. But if the executor had at first enough to pay all the legacies, and by his subsequent wasting of the assets they became deficient, in that case, such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence. *Ib.*
6. A legatee suing on an administrator's bond for a legacy must show the same facts that he would be compelled to show had he sued the administrator by bill in equity. *Ib.*

LICENSE.

See GROCERIES AND DRAM-SHOPS.

1. A dram-shop license does not authorize the holder to sell liquor on Sunday. *State v. Ambs*, 214.

LIEN.

See JUDGMENT, 14, 15, 16.

1. A *bona fide* unrecorded deed for real estate will prevent the lien of a judgment against the grantor from attaching, if recorded before a sale under the judgment. *Valentine v. Havener*, 133.
2. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg v. Heitcamp*, 569.

LIMITATIONS.

1. Where there are mutual running accounts, and the last item on the credit side is within the period which would be a bar by the statute of limitations, the whole account is saved from the operation of the statute. *Penn v. Watson*, 13.
2. An adverse possession by a mortgagee, under the statute of limitations, to be a defence against a suit brought by the mortgagor to redeem, must at least be an *actual* possession. Payment of taxes on wild land is not sufficient. *Bollinger v. Chouteau*, 89.
3. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Ib.*
4. The statute of limitations runs in favor of an administrator against the distributee of an estate from the date of the final settlement and order of distribution. *The State v. Blackwell*, 97.
5. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Thompson & Wife v. Lyon*, 155.
6. D. bought a claim to a tract of land in 1820, and soon afterwards took possession of it, built a dwelling, lived upon and cultivated it for eight or ten years, and then removed to Illinois. Afterwards, he paid all the taxes upon the land, had tenants on it part of the time, and when not

LIMITATIONS—(Continued.)

tenanted, had an agent in the neighborhood to rent it out for him and protect it from trespassers. *Held*, this was such an adverse possession as, after the lapse of twenty years, was protected by the statute of limitations. *Williams v. Dongan*, 186.

7. There is no tacking of disabilities under our statute of limitations. *Ib.*
- 8.. The lapse of thirty years held no bar to the foreclosure of a mortgage upon wild and unimproved land, where neither mortgagor nor mortgagee had been in possession, there being evidence that the mortgagor abandoned all claim to the land after executing the mortgage, and that the mortgage debts were unpaid. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. *Chouteau v. Burlando*, 482.
9. A person who goes to California with the intention of returning, leaves his family and property in Missouri, although he may remain there engaged in business for several months, is not within the last clause of the seventh section of the second article of the statute of limitations. The operation of the statute is not suspended during his absence. *Garth v. Robards*, 523.
10. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton v. Keeton*, 530.
11. If a complainant relies upon a disability as exempting him from the operation of the statute of limitations, he should set it up in his bill. *Ib.*
12. It is settled that a person out of this state, but within the United States, is not within the meaning of the words "beyond seas" in the statute of limitations of 1825. *Ib.*
13. Cumulative disabilities are not allowed. So, where a cause of action accrues in favor of an infant female, the statute begins to run from the time she becomes of age, although she previously marries. But where two disabilities exist when the cause of action accrues, the statute does not begin to run until they are both removed. *Ib.*
14. One party, who is saved from the operation of the statute of limitations by a disability, can obtain no relief upon a bill in equity jointly with other parties who are barred. *Ib.*
15. Where a bill in chancery, to which limitation was set up as a bar, contained no allegation of any exempting disability, but it appeared in evidence that some of the complainants had been under a disability which prevented a bar, though the others had not, the supreme court reversed a decree dismissing the bill, in order to afford an opportunity to amend, so as to save the rights of those who were not barred. *Ib.*

MARRIAGE CONTRACT.

1. Neither by the Spanish law nor by the custom of Paris did a royal grant or gift to either of two spouses enter into the community. *Wilkinson v. The American Iron Mountain Co.*, 122.

MARRIAGE CONTRACT—(Continued.)

2. The same rule applied to concessions in Louisiana, unless when made upon a consideration which was a burden on the community. *Ib.*
3. A marriage contract, entered into at Ste. Genevieve in 1797, contained this clause: "The intended consorts shall be in community as to all property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, &c. *Held*, the words "according to and in conformity with the custom of this place" referred to the community, and not to the acquisition of property, and the clause did not have the effect to bring into the community property which would otherwise not be embraced by it. *Ib.*
4. The operation of a clause in a marriage contract, establishing a community cannot be enlarged by a subsequent clause providing for a renunciation of it. *Ib.*

MORTGAGE AND DEED OF TRUST.

See EXECUTION, 7, 8. USES AND TRUSTS, 7.

1. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void. *Bollinger v. Chouteau*, 89.
2. An adverse possession by a mortgagee, under the statute of limitations, to be a defence against a suit brought by the mortgagor to redeem, must at least be an actual possession. Payment of taxes on wild land is not sufficient. *Ib.*
3. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Ib.*
4. A mortgagee in possession, upon a bill by the mortgagor to redeem, will be allowed for all permanent and useful improvements, deducting rents and profits, and for all taxes paid. *Ib.*
5. The only effect of a failure by a mortgagee to make a subsequent incumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine v. Havenner*, 133.
6. An unrecorded mortgage is good against a judgment, if recorded before a sale under the judgment. *Ib.*
7. Where a minor *feme covert* joins with her husband in a mortgage of her real estate to secure a debt of the husband, she may, even during her minority, in a suit to foreclose, avail herself of the plea of infancy. *Schneider v. Staihr*, 269.
8. The husband's estate during the marriage may however be subjected to sale, or at all events, if there was personal service, the mortgagee is entitled to a general judgment against him. *Ib.*
9. The act of 1849, exempting property of wives from execution for any security debts of their husbands, does not prevent the wife from joining with her husband in a mortgage of her real estate to secure a debt contracted by her husband as security. *Ib.*

MORTGAGE AND DEED OF TRUST—(Continued.)

10. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Ib.*
11. K. executed to R. an absolute deed for land. R. executed to K. a bond to reconvey, upon payment of a certain sum on or before a specified day. Before the day arrived, R. commenced an ejectment suit against K.'s tenant in possession, in which he recovered judgment for the possession and damages. On the day named in the bond, K. made a tender to R. of the proper amount, but it was not accepted. Afterwards, K.'s interest in the land was sold under execution to A. In a proceeding by A. against R. for the legal title, *held*, in taking an account, R. was to be allowed for the cost of all permanent improvements erected on the premises after he came into possession, and was to be charged with the rent received by him and with the amount of damages recovered in the ejectment suit; and it would seem to make no difference that he received the rents and recovered the damages before A. acquired any title. *Anthony v. Rogers*, 281.
12. The effect of the satisfaction of a mortgage is to extinguish the incumbrance upon the title, for the benefit of whoever is the owner of it at the time. *Gale v. Mensing*, 461.
13. P. gave a note, with R. & E. as his sureties, to whom he executed a mortgage on real estate for their indemnity. R. & E. subsequently paid the note in equal proportions. E. afterwards purchased P.'s equity of redemption in the real estate under execution. There was an understanding between R. & E. that the purchase was on their joint account, but the deed was made to E. and it did not appear that R. was in a situation to enforce the agreement. In a suit by P. against R. for the statutory penalty for refusing to enter satisfaction of the mortgage, and to compel him to deliver up the note in his possession to be cancelled, *held*, that it could not be maintained. *Phelps v. Relfe*, 479.
14. The lapse of thirty years held no bar to the foreclosure of a mortgage upon wild and unimproved land, where neither mortgagor nor mortgagee had been in possession, there being evidence that the mortgagor abandoned all claim to the land after executing the mortgage, and that the mortgage debts were unpaid. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. *Chouteau v. Burlando*, 482.
15. The omission of the officer taking the acknowledgment of a mortgage to certify to the personal identity of the grantor, can only be taken advantage of by a subsequent purchaser for a valuable consideration. *Ib.*
16. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg v. Hettcamp*, 569.
17. The only effect of a failure by a mortgagee to make a subsequent in-

MORTGAGE AND DEED OF TRUST—(Continued.)

cumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine v. Havener*, 133.

MURDER.

See INDICTMENT, 1, 2, 3, 4. VERDICT, 2.

NEW TRIAL.

1. A new trial will not be granted on account of newly discovered evidence which is merely cumulative. *State v. Larrimore*, 425.

NONSUIT.

1. A voluntary nonsuit taken upon refusal to strike out answer as insufficient will not be set aside. *Dumey v. Schaeffler*, 323. *Louisiana and Middletown Plank Road Co. v. Mitchell*, 432.

NOTARY PUBLIC.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*. *Ex parte Mallinkrodt*, 493.

NOTICE.

See VENDOR AND PURCHASER, 1, 2. EXECUTION, 7, 8.

OFFICERS.

1. Where ministerial officers are required to exercise their judgment, they are not liable for any errors, in the absence of malice. So, a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed v. Conway*, 22.
2. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State v. Muir & Ritter*, 303.
3. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*

OFF-SET.

See SET-OFF.

PARTITION.

1. A note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney v. Brooks*, 105.
2. Partition sale set aside, where it appeared that the bidders, for the purpose of obtaining the property at a sacrifice, agreed that one should

PARTITION—(*Continued.*)

- become the purchaser, and the others refrain from bidding, in consideration of sharing the benefits of the purchase. *Morton v. Hinkle*, 290.
3. A court cannot refuse to entertain a motion to set aside a partition sale because all interested do not join in the motion. *Neal v. Stone*, 294.
 4. A partition sale will be set aside, where the evidence shows any collusion or contrivance to enable the purchaser to obtain the land below its real value. *Ib.*
 5. In a partition suit, judgment that partition be made is an interlocutory judgment from which no appeal lies. *McMurtry v. Glascock*, 432.

PARTNERSHIP.

See ATTACHMENT, 1. DECREE, 1.

1. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one half A.'s interest in the metals and ores" that might be obtained. *Held*, A.'s interest in the outfit did not pass. *Phillips v. Jones' Adm'r*, 67.
2. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring v. Duhring*, 174.
3. One partner may sue for the breach of a contract made by him in his own name, although it was made for the benefit of the firm. *Taylor v. Steamboat Robt. Campbell*, 254.
4. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury v. McIntosh*, 278.
5. A firm composed of C. & G., and doing business under that style, was succeeded by another firm styled C., G. & Co., composed of C., G. and a son of C., which again was succeeded by a third firm of the same style as the first, but composed of C.'s son and G. During the existence of the last firm, a note was by G. given in its name to a party who had dealt with the first firm, and was without notice of its dissolution. *Held*, this was *prima facie* the note of the firm existing when it was given, and so not binding upon C., the member of the first firm of the same style. But if it was in fact given on account of that firm to a customer without notice, C. would be bound. *Pomeroy v. Coons*, 598.

PATENT.

1. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman v. Johnson*, 108.
2. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*

PATENT—(Continued.)

3. The mere fact of a prior entry is no ground of equitable relief against a patent. *Ib.*
4. In an action *at law*, a patent is conclusive of the true location of the land confirmed by the act of congress of March 3, 1807. *Maguire v. Vice*, 429.
5. A party who, under the present practice, seeks equitable relief against a patent, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Ib.*

PHYSICIAN.

See GROCERIES AND DRAM-SHOPS.

PLEADING.

1. If a material averment permitted to be inserted in a petition at the trial by way of amendment is unanswered, it is to be taken as admitted. But if the answer contains a defence to the petition with the additional averment, the court should proceed to try the case in the same manner as if the averment had been in the petition at first and was unanswered. *Robards v. Munson*, 65.
2. A party seeking equitable relief under the new system of practice must state facts which would have been a ground for such relief under the old system. *Jones v. Brinker*, 87.
3. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of a merely equitable defence. *Kennedy v. Daniels*, 104.
4. Under the new practice, a party who relies upon facts which would constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would formerly have been necessary in a bill in chancery. *Carman v. Johnson*, 108.
5. The mere statement in an answer that the defendant's entry was prior to the entry upon which the plaintiff's patent issued, is no ground of equitable relief. *Ib.*
6. It has been repeatedly held that, under the new practice, multifariousness is still an objection to a pleading. Different causes of action against different parties cannot be joined. *Robinson v. Rice*, 229.
7. Under the new practice, a party cannot state one cause of action, and ask that, if it proves unfounded, another cause of action may be tried. That is not a joinder of several causes of action. *Ib.*
8. In declaring upon a note, it is not necessary to set out a consideration in the declaration. *Cuples v. Branham*, 224.
9. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Schneider v. Staihr*, 269.
10. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposi-

PLEADING—(Continued.)

- ted with him a chattel as a pledge for his indemnity, and thereupon, the note was given, merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan v. Moss*, 297.
11. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler v. Servoss*, 6 Mo. Rep. 24, affirmed.) *Dowd v. Winters*, 361.
 12. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully and negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs v. Miller*, 391.
 13. A party, who, under the present practice, seeks equitable relief against a legal title, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Maguire v. Vice*, 429.
 14. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud. *Edgell v. Sigerson*, 494.
 15. If a complainant relies upon a disability as exempting him from the operation of the statute of limitations, he should set it up in his bill. *Keeton v. Keeton*, 530.
 16. One party who is saved from the operation of the statute of limitations by a disability, can obtain no relief upon a bill in equity jointly with other parties who are barred. *Ib.*
 17. A suit for slaves claimed under a conveyance in trust should be brought in the name of the trustees and not of the beneficiaries. *Gibbons v. Gentry*, 468.

POWERS.

See USES AND TRUSTS, 1, 2, 3, 4.

PRACTICE.

See PRACTICE IN CHANCERY. PLEADING. SUPREME COURT. BILL OF EXCEPTIONS. NONSUIT. NEW TRIAL.

1. If a material averment permitted to be inserted in a petition at the trial by way of amendment is unanswered, it is to be taken as admitted. But if the answer contains a defence to the petition with the additional averment, the court should proceed to try the case in the same manner as if the averment had been in the petition at first and was unanswered. *Robards v. Munson*, 65.
2. A party seeking equitable relief under the new system of practice must

PRACTICE—(Continued.)

- state facts which would have been a ground for such relief under the old system. *Jones v. Brinker*, 87.
3. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *State v. Ruggles*, 99.
 4. Judgment reversed for an insufficient finding of the facts. *State v. Ruggles*, 99. *Javens v. Harri's*, 262.
 5. Where a defendant in ejectment relies in his answer upon a legal title he cannot at the trial avail himself of a merely equitable defence. *Kennedy v. Dantels*, 104.
 6. Under the new practice, a party who relies upon the facts which would constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would for, merely have been necessary in a bill in chancery. *Carman v. Johnson*, 108.
 7. Judgment reversed for want of a finding of the facts. *Davidson v. Rozter*, 132. *Jamison v. Hughes*, 133. *Whyte v. Bennett's Adm'r*, 262.
 8. It has been repeatedly held that, under the new practice, multifariousness is still an objection to a pleading. Different causes of action against different parties cannot be joined. *Robinson v. Rice*, 229.
 9. Under the new practice, a party cannot state one cause of action, and ask that, if it proves unfounded, another cause of action may be tried. That is not a joinder of several causes of action. *Ib.*
 10. Where a cause is tried by a court without a jury, the supreme court will affirm if the facts found support the judgment, without regard to the instructions given or refused. *Ib.*
 11. The supreme court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are only referred to in the record by line and page of the original. *Ib.*
 12. One instalment of a note due by instalments may be recovered before the others are due; and under the new practice, it would probably not be material whether the amount is sought to be recovered as a debt or damages. *Caples v. Branham*, 244.
 13. Bill for a divorce. It appeared from the record that, after a decree nisi, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver v. Oliver*, 261.
 14. A finding must contain a statement of facts proved, not a detail of evidence. *Javens v. Harri's*, 262.
 15. Bill of exceptions must be filed at term of trial. *Ruble v. Thomasson*, 263.
 16. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Schneider v. Staihr*, 269.

PRACTICE—(Continued.)

17. Trial by court of an appeal from a justice, and no question of law saved. Judgment affirmed. *Atken v. Todd*, 276.
18. A defendant after appearance cannot take advantage of a variance between the petition and the summons in the names of the plaintiffs. *Hite v. Hunton*, 286.
19. The insertion of an "&" between the christian and sur-name of a plaintiff in the caption of a petition, may be summarily amended. *Ib.*
20. A court cannot refuse to entertain a motion to set aside a partition because all interested do not join in the motion. *Neal v. Stone*, 294.
21. Judgment affirmed because no question of law was ruled below against the appellant. *Garner v. Beauchamp*, 318.
22. The supreme court will not disturb a non-suit voluntarily taken by a plaintiff, upon the overruling of a motion to strike out a part of the defendant's answer. (*Schulter v. Bockwinkle*, 19 Mo. Rep. 647, affirmed.) *Dumey v. Schoeffler*, 323.
23. Where a cause appealed from a justice of the peace is tried in the circuit court upon an agreed statement of facts, the supreme court will reverse unless the facts support the judgment, although no instructions are asked. *Stone v. Corbett*, 350.
24. After an appeal has once been granted, the power of the inferior court over the subject is exhausted. If the appeal is dismissed, or if from any cause the party loses the benefit of it, he cannot take another appeal, but must resort to his writ of error. *Brill v. Meek*, 359.
25. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull v. Dowdall*, 359.
26. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Ib.*
27. A party objecting to the admission of a record in evidence must specify his objections. *State v. Gates*, 400.
28. One witness swearing that he saw two men on horseback meet in a road, and that they wheeled as they passed and had an angry conversation, and another witness, who also saw them meet, swearing that he did not see them wheel, an instruction to the jury that affirmative must prevail over negative testimony was held inapplicable and erroneous. *Ib.*
29. A new trial will not be granted on account of newly discovered evidence which is merely cumulative. *State v. Larrimore*, 425.
30. A party who, under the present practice, seeks equitable relief against a legal title, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Mag re v. Vice*, 429.
31. No appeal or writ of error lies from a voluntary non-suit taken upon the refusal of the inferior court to strike out an answer as insufficient. *Louisiana & Middletown Plank Road Co. v. Mitchell*, 432.
32. It being important to know whether a purchaser for value of real estate

PRACTICE—(Continued.)

- had notice of fraud vitiating the title of his vendor, the court trying the case without a jury must explicitly find upon this point. *Chouteau v. Nuckolls*, 442.
33. It has been repeatedly held that the practice act of 1849, (except the 25th article,) does not apply to the trial in the appellate court of a cause appealed from a justice of the peace; but the old practice must still be observed. No finding of facts is necessary. Declarations of law must be asked, and the material evidence preserved in a bill of exceptions; otherwise, the case will not be reviewed in the supreme court. *Clohecy v. Ragan*, 453.
34. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren v. Relfe*, 455.
35. After the death of an administrator, plaintiff, a succeeding administrator was substituted as plaintiff, without the appearance of the defendant, or the service of a *scire facias*. The defendant afterwards appeared, and filed a motion to set aside the order of substitution, which being overruled, he appealed to the supreme court, where the order was set aside. *Hell*, this was such an appearance by the defendant as dispensed with the necessity for a *scire facias* after the cause was remanded to bring him into court; being already in court, he might be required to show cause against the proposed substitution, and upon his failure to do so, the order might be renewed. *Ferris' Adm'r v. Hunt*, 464.
36. Under the first section of the fourth article of the practice act of 1849, the jurisdiction of courts, in suits where land is the subject of litigation, depends exclusively upon the residence or presence of the parties, and not upon the location of the land. That section repeals the second section of the first article of the act concerning practice in chancery, (R. C. 1845.) *Miller v. Thurmond*, 477.
37. As by our statute, the letters of an administrator are revoked by the fact of his becoming a non-resident, he cannot afterwards be made a party to a suit in his administrative capacity. *Chouteau v. Burlando*, 482.
38. In a suit commenced before a justice, an account was filed, the first item of which was "balance from 1851, \$97 90." *Held*, the generality of this item was no sufficient ground for dismissing the suit in the appellate court. *Busch v. Diepenbrock*, 568.
39. A circuit court has no power to insert a clause in a judgment, authorizing the party against whom it is rendered to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, a judgment was set aside at the next term, and a new judgment rendered, it was treated as a nullity by the supreme court, and the first judgment reinstated. *Hill v. City of St. Louis*, 584. *Shepard v. City of St. Louis*, 589.
40. The supreme court will not reverse a case because the plaintiff did not

PRACTICE—(Continued.)

swear anew to his petition after an amendment in the caption. *Matthews v. Rountree*, 282.

41. The supreme court will not reverse because the inferior court refused time to answer after the overruling of a motion to dismiss for frivolous reasons. *Ib.*
42. A suit for slaves claimed under a conveyance in trust should be brought in the name of the trustees and not of the beneficiaries. *Gibbons v. Gentry*, 468.
43. Where the plaintiff, in a suit for wages, closes his case, having proved services, but not their value, but immediately afterwards offers to remedy the oversight, a court, in the exercise of its discretion, should permit him to do it. *Owen v. O'Reilly*, 603.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. A judgment of conviction in a criminal case cannot be sustained, where the record does not show that the defendant was ever in court until after verdict. *State v. Matthews*, 55.
2. It is the duty of the court to instruct the jury in a criminal case. If the instructions asked are objectionable in their phraseology, the court should not neglect to give such as the law of the case requires. *Ib.*
3. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle v. Nichols*, 326.
4. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State v. Baker*, 338.
5. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State v. Rich*, 393.
6. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *Ib.*
7. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *State v. Upton*, 397.
8. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *Ib.*
9. A second change of venue may be granted where the judge has been counsel in the cause, notwithstanding the twenty-eighth section of article five of the act concerning practice and proceedings in criminal cases. (R. C. 1845.) *State v. Gates*, 400.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(Cont'd.)

10. A recognizance taken by a justice, conditioned that a party charged with crime shall appear before the proper court at its next term, is not void for omitting to add "to answer the charge" or "to answer an indictment." *State v. Davidson*, 406.
11. A recognizance cannot be *quashed*. Its validity can only be contested upon a *scire facias* after forfeiture. *Ib.*
12. A grand jury may be summoned and an indictment found at an adjourned term by statute. *State v. Barnes*, 413.

PRACTICE IN CHANCERY.

See PRACTICE, 36. USES AND TRUSTS, 7.

1. A bill of review for errors apparent on the face of the record, will not lie after the time when the writ of error could be brought. *Creath v. Smith & Atkins*, 113.
2. In this state, a decree against infants, for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given them after coming of age to show cause against it. *Scott, J.*, dissenting. *Ib.* 113.
4. The provision in the act regulating practice in chancery, (R. C. 1845,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree for a divorce. *Scott, J.*, dissenting. *Smith v. Smith*, 166.
5. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring defendants before the court to defend for all parties interested. *McQueen v. Chouteau's Heirs*, 222.
6. Under the chancery practice which formerly prevailed, an answer, if responsive to the bill, was to be taken as true, if no replication was filed. *Ib.*

PRINCIPAL AND AGENT.

1. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable *in an action upon the note*, upon proof of his want of authority. *Byars v. Doores*, 284.
2. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (*Scott, J.*, dissenting.) *Wheeler v. Barret*, 573.
3. Although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. (*Scott, J.*, dissenting.) *Page & Bacon v. Lathrop*, 589.
4. Can a payee, who receives a bill, drawn by an agent in the name of his principal under a written authority shown to him at the time, after-



PRINCIPAL AND AGENT—(Continued.)

wards charge the agent as principal, as having drawn without authority? *Ib.*

PRINCIPAL AND SURETY.

See CONSTABLE, 1, 2.

1. The principal and security in a recognizance to answer an indictment acknowledged themselves *each* to be bound in a specified sum. *Held*, their liability was several and not joint, and a remission by the governor after forfeiture in favor of the principal would not discharge the security. *State v. Davidson*, 212.

PROCESS.

1. A widowed sister keeping house for her brother, is a "member of his family," upon whom process may be served. *Wade v. Jones*, 75.
1. The president is the proper party upon whom to serve process against a corporation. *Chamberlin v. The Mammoth Mining Co.*, 96.

PROMISSORY NOTES.

See BONDS AND NOTES, 4, 5, 6, 7.

1. Note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney v. Brooks & Ervin*, 105.
2. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable *in an action upon the note* upon proof of his want of authority. *Byars v. Doores*, 284.
3. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposited with him a chattel as a pledge for his indemnity, and thereupon, the note was given merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan v. Moss*, 297.
4. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescission of the contract in a proceeding to which he was not a party. *Powers v. Heath's Adm'r*, 319.
5. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smith v. Ashby*, 354.
6. It is a good defence to a note given for the purchase money of land conveyed with warranty, that the purchaser acquired no title. *Hobett v. Drewell*, 450.
7. A party who puts his name upon the back of a negotiable note, to which, at the time, he is not a party, is *prima facie* liable as maker; and although, as between parties entitled to look into the real transac-

PROMISSORY NOTES—(Continued.)

- tion, it may be shown that he signed as endorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice and for value. *Schneider v. Schiffman*, 571.
8. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (Scott, J., dissenting.) *Wheeler v. Barret*, 573.
 9. A firm composed of C. & G., and doing business under that style, was succeeded by another firm styled C., G. & Co., composed of C., G. and a son of C., which again was succeeded by a third firm of the same style as the first, but composed of C.'s son and G. During the existence of the last firm, a note was by G. given in its name to a party who had dealt with the first firm, and was without notice of its dissolution. Held, this was *prima facie* the note of the firm existing when it was given, and so not binding upon C., the member of the first firm of the same style. But if it was in fact given on account of that firm to a customer without notice, C. would be bound. *Pomeroy v. Coons*, 598.

PROVOCATION.

1. What provocation will mitigate a murder is a question of law. (*State v. Dunn*, 18 Mo. Rep. affirmed.) *State v. Jones*, 58.

PUBLIC LANDS.

See LANDS AND LAND TITLES.

1. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield v. Branson*, 301.

RAILROAD.

1. Under the charter of the Hannibal and St. Joseph railroad company (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal & St. Joseph Railroad Co. v. Morton*, 70.
2. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill v. Ragan*, 451.

RECOGNIZANCE.

1. The principal and security in a recognizance to answer an indictment acknowledged themselves *each* to be bound in a specified sum. Held, their liability was several and not joint, and a remission by the governor

RECOGNIZANCE—(Continued.)

- after forfeiture in favor of the principal would not discharge the security. *State v. Davidson*, 212.
2. A gubernatorial remission from liability upon a recognizance to appear in one county cannot be made to apply to a recognizance to appear in a different county. *Ib.*
 3. A recognizance taken by a justice, conditioned that a party charged with crime shall appear before the proper court at its next term, is not void for omitting to add "to answer the charge" or "to answer an indictment." *State v. Davidson*, 406.
 4. A recognizance cannot be *quashed*. Its validity can only be contested upon a *scire facias* after forfeiture. *Ib.*

RECORDS.

1. A party objecting to the admission of a record in evidence must specify his objections. *State v. Gates*, 400.

RECOUPMENT.

See DAMAGES, 5.

ROADS AND HIGHWAYS.

1. A party who is prosecuted, (under sections 59 and 60 of article one of the act concerning roads and highways, (R. C. 1845,) for obstructing a public way over his own land, may show that his property has not been condemned for public use in the manner prescribed by law. *Golahar v. Gates*, 236.
2. An indictment under the 57th section of article one of the act concerning "roads and highways," (R. C. 1845,) must distinctly charge that the fork of the road at which the defendant failed to place a finger board, is within the road district of which he was overseer; and to constitute an offence under this section, the roads forming the fork must not terminate at the same point. *State v. Tuley*, 422.

SALARY.

1. The provision, in the act establishing the St. Louis land court approved February 23, 1853, that the judge should receive the same compensation as the judge of the St. Louis court of common pleas then received, means, not only that he should receive the *same amount*, but from the *same sources*. *Bates v. St. Louis County Court*, 499.

ST. LOUIS LAND COURT.

See SALARY.

SALE.

See AGREEMENT, 1. As to CONDITIONAL SALE, see MORTGAGE 11. As to recoupment of damages, see DAMAGES 5.

1. Where a vendor is in possession of personal property, and sells for full value, a warranty of title is implied. *Robinson v. Rice*, 229.
2. A husband, in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Ib.*
3. Partition sale set aside, where it appeared that the bidders, for the purpose of obtaining the property at a sacrifice, agreed that one should

SALE—(Continued.)

- become the purchaser, and the others refrain from bidding, in consideration of sharing the benefits of the purchase. *Wooton v. Hinkle*, 290.
4. A court cannot refuse to entertain a motion to set aside a partition sale because all interested do not join in the motion. *Neal v. Stone*, 294.
 5. A partition sale will be set aside, where the evidence shows any collusion or contrivance to enable the purchaser to obtain the land below its real value. *Ib.*
 6. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield v. Branson*, 301.
 7. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them at the time agreed upon. He must, when he buys, intend never to pay for them, to prevent the title from passing; and this is a question for a jury. *Bidault v. Wales*, 546.
 8. Although a vendor may avoid a sale as against the purchaser, yet this cannot be done when the rights of third parties have intervened. This exception however does not embrace creditors of the purchaser seizing the property by attachment or under execution, or taking it by assignment as a security for pre-existing debts. Whether it would extend to the protection of the lien of a factor of the purchaser for a general balance, or a lien in relation to the specific property, left open. *Ib.*
 9. As a general rule, goods existing separately and ready for immediate delivery, are the only proper subjects of a common law sale, which is, strictly speaking, a transaction operating as a present transfer of title, and does not include executory contracts for the sale and delivery of goods to be separated from a larger mass, or to be afterwards procured or manufactured for the buyer. *Cunningham v. Ashbrook*, 553.
 10. To constitute a delivery, within the meaning of the statute of frauds, there must be not only a change of the actual possession, but a change of the civil possession, which is a holding of the thing, with the design of keeping it as owner; and this is a question of fact for a jury. *Ib.*
 11. The principle that, in a sale of goods, no title passes, while any act, such as counting, weighing or measuring, remains to be done by the seller, is only applicable when such act is necessary to separate the goods from a larger mass; and does not apply to the sale upon fixed terms, by weight to be subsequently ascertained, of goods already separated, in which case the title passes by delivery; and as a consequence, the loss by a destruction of the goods, after they are delivered and before they are weighed, will fall upon the buyer. *Ib.*
 12. Although there is no sale until the price is settled, yet it is settled, within the meaning of this rule, where the terms are so fixed that the sum to be paid can be ascertained by weighing, without further reference to the parties themselves. *Ib.*
 13. As in the sale of an entire drove of hogs, upon fixed terms, by net weight, a jury would be at liberty to infer delivery from change of

SALE—(Continued.)

possession, an instruction which would be understood to assert, as a matter of law, that this inference would be repelled by the fact that the hogs were to be subsequently weighed, is erroneous. *Ib.*

14. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling v. Ball & Chapin*, 563.

SCHOOL LANDS.

1. An indictment under the thirtieth section of the act concerning "school lands," (R. C. 1845,) which charges the defendant with committing "waste, trespass and other injury," &c., "by cutting down and carrying away timber," &c., is not bad for duplicity. *State v. Myers*, 409.

SCIRE FACIAS.

See PRACTICE, 35.

SECURITIES.

See PRINCIPAL AND SURETY. CONSTABLE.

SET-OFF.

1. In an action by the general assignees of an insolvent, to recover a debt due the assignor, the defendant was allowed to set up as an equitable defence or set-off the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment. *Morrow's Assignees v. Bright*, 298.
2. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smith v. Ashby*, 354.
3. A party sued before a justice filed as an off-set an account exceeding the justice's jurisdiction, but attempted to be brought within it by a credit for the amount of the plaintiff's demand. *Held*, this could not be allowed as a set-off. *Almeida v. Sigerson*, 497.

SHERIFF.

1. A note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney v. Brooks*, 105.

SHERIFF'S DEED.

1. Smallness of consideration in a sheriff's deed not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau v. Nuckolls*, 442.
2. D. was originally the owner of 10,256 arpens of land, out of which he had conveyed 4000 arpens to his son, and afterwards mortgaged 4426

SHERIFF'S DEED—(Continued.)

arpens described as his remaining interest in the tract. A sheriff's deed subsequently conveyed all his interest in the whole tract *except* 4426 arpens described as *sold by the sheriff at a previous term of the court*, of which previous sale there was no evidence in the record. *Held*, the sheriff's deed passed no interest in the 4426 arpens covered by the mortgage. *Chouteau v. Burlando*, 482.

SHERIFF'S SALE.

See SALE, 3, 4, 5.

SLANDER.

See PLEADING, 11. VARIANCE.

1. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle v. Nichols*, 326.
2. The words "you swore to a lie before the grand jury" held actionable. *Perselly v. Bacon*, 330.
3. The words "you swore to a lie before the grand jury" being actionable in themselves, no *colloquium* is necessary to show their application; and if the petition contains one, it may be rejected as surplusage, although it shows that the words were used in allusion to the testimony given in a matter where perjury could not be committed, unless it appears that the allusion was explained by the defendant, so as to be understood at the time of making the charge. *Ib.*
4. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler v. Sereoss*, 6 Mo. Rep. 24, affirmed.) *Dowd v. Winters*, 361.

SLAVES.

1. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert v. Rider & Allen*, 146.
2. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
3. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler v. Chapman*, 249.

SLAVES—(Continued.)

4. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Ib.*

SPANISH LAW.

See COMMUNITY.

SPECIFIC PERFORMANCE.

1. It is optional with a party who has made a parol contract to convey land, to avail himself of the plea of the statute of frauds or not. (*McGowen v. West*, 7 Mo. Rep. 570, affirmed.) *Farrar v. Patton*, 81.
2. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
3. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought to be enforced. *Ib.*
4. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke v. Leewright*, 85.
5. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
6. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring defendants before the court to defend for all parties interested. *McQueen v. Chouteau's Heirs*, 222.
7. Where a party files a bill in equity for the specific performance of a contract for the conveyance of land, knowing at the time that it is not in the power of the defendant specifically to perform the contract, the court will not, in ordinary cases, decree to him compensation in damages, but will leave him to his remedy at law for a breach of the contract. *McQueen v. Chouteau's Heirs*, 222.

STATUTES, CONSTRUED AND COMMENTED UPON.

- Administration, (R. C. 1845,) article 2, sec. 24. *Penn v. Watson*, 13.
Stetn v. Weldman, 17.
 article 7, secs. 5, 7 and 8.* *The State v. Ruggles*, 99.
 article 1, sections 49 to 56. *Asbury v. McIntosh*, 278.
 article 4, section 1. *Harness v. Green's Administrator*, 316.
 article 1, section 58. *Chouteau v. Burlando*, 482.
- Assignments, (R. C. 1845.) *Page & Bacon v. Gardner*, 507.

STATUTES—(Continued.)

- Boats and Vessels, (R. C. 1845,) 4th subdivision of section 1. *Taylor v. Steamboat Robt. Campbell*, 254.
- Bonds and Notes, (R. C. 1845,) section 1. *Caples v. Brenham*, 244.
section 3. *Smith v. Ashby*, 354.
section 6. *Stone v. Corbett*, 350.
- Corporations, (R. C. 1845,) article 2, sec. 2. *Chamberlin v. The Mammoth Mining Co.*, 96.
- Chouteau Spring Co., act incorporating, (Sess. Acts of 1849, p. 168.) *Chouteau Spring Company v. Harris*, 382.
- Crimes and Punishments, (R. C. 1845,) article 3, section 38. *State v. Matthews*, 55.
article 2, section 1. *State v. Jones*, 58.
article 8, section 8. *State v. Byron*, 210.
art. 1, secs. 31, 32, 33 and 34. *State v. Amba*, 214.
article 9, section 35. *Fackler v. Chapman*, 249.
article 8, secs. 40, 41 and 42. *State v. Shiflett*, 415.
art. 8, sec. 8. *State v. Bess*, 419. *State v. Wilhight*, 422.
- Divorce, (R. C. 1845,) section 2. *Smith v. Smith*, 166.
- Execution Exemption Act, (R. C. 1845, Sess. Acts of 1847.) *Wade v. Jones*, 75.
- Execution Act of 1849, exempting property of husbands and wives for each other's debts, (Sess. Acts of 1849, p. 67.) *Tally v. Thompson*, 277. *Cunningham v. Gray*, 170. *Schneider v. Stathr*, 269.
- Executions to other counties, Act concerning, (Sess. Acts of 1849, p. 52.) *Hobein v. Murphy*, 447. *Hobein v. Drewell*, 450.
- Frauds and Perjuries, (R. C. 1845,) sec. 5. *Farrar v. Patton*, 81. *McIlvatne v. Harris*, 457. *Parke v. Leewright*, 85.
- Fraudulent Conveyances, (R. C. 1845,) sec. 1. *Brooks v. Wimer*, 503.
- Groceries and Dram Shops, (R. C. 1845,) section 1. *State v. Larri-more*, 425.
sections 1 and 2. *State v. Searcy*, 489.
- Hannibal and St. Joseph Railroad Co., Act incorporating, (Sess. Acts 1847, p. 156. *Hannibal & St. Joseph Railroad Co. v. Morton*, 70.
- Justices' Courts, (R. C. 1845,) article 6, section 2. *Chamberlin v. The Mammoth Mining Co.*, 96.

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- Land Court, St. Louis, Act establishing, (Session Acts, 1853, p. 90.)
Bates v. St. Louis County Court,
 499. *Hull v. McCune*, 596.
- Limitations, (R. C. 1845,) article 2, sec. 7. *Garth v. Robards*, 523.
- Mortgages, (R. C. 1845,) secs. 22, 23 and 24. *Phelps v. Relfe*, 479.
- Partition, (R. C. 1845,) section 37. *Ranney v. Brooks & Ervin*, 105.
- Practice Act of 1849, article 25, secs. 1 and 2. *Penn v. Watson*, 13.
Stein v. Weidman, 17.
 article 3, section 3. *Smith v. Ashby*, 354.
 article 19, section 8. *Brill v. Meek*, 358.
 article 22, (confession of judgment.) *Hull v. Dowdall*, 359.
 article 3, secs. 1 and 2. *Vandoren v. Relfe*, 455.
 article 15, section 2. *Javens v. Harris*, 262.
 article 4, sec. 1, held to repeal section 2 of article 1 of the chancery practice act of 1845. *Miller v. Thurmond*, 477.
- Practice in Chancery, (R. C. 1845,) art. 1, sec. 1. *Creath v. Smith & Atkins*, 113.
 article 6, secs. 1, 2, 3, 4. *Smith v. Smith*, 166.
- Practice and Proceedings in Criminal Cases, (R. C. 1845,) sections 15 and 17, article 3.
Tindle v. Nichols, 326.
 section 16, article 3. *State v. Baker*, 338.
 article 7, section 1. *State v. Upton*, 397.
 article 5, section 28. *State v. Gates*, 400.
 article 2, section 26. *State v. Davidson*, 406.
 article 3, section 13. *State v. Barnes*, 413.
- Roads and Highways, (R. C. 1845,) article 1, section 57. *State v. Tuley*, 422.
 article 1, secs. 59 and 60. *Golahar v. Gates*, 236.
- School Lands, (R. C. 1845,) section 30. *State v. Myers*, 409.
- Slaves, (R. C. 1849,) article 1, sections 31 and 32. *Calvert v. Rider & Allen*, 146.
- St. Louis, Act to provide general system of sewerage in, (Sess. Acts of 1849, p. 519.) *Page v. City of St. Louis*, 136.
- Wills, (R. C. 1845,) section 5. *Northcutt v. Northcutt*, 266.
- Witnesses, (R. C. 1845,) section 8. *Ex parte Mallinkrodt*, 493.
- ST. LOUIS, CITY OF.
 See TAXES.

ST. LOUIS, CITY OF—(Continued.)

1. Under ordinance No. 3037 of the city of St. Louis, approved July 29, 1853, supplementary to ordinance No. 2952, approved January 7, 1853, flour manufactured in the city was not required to be submitted for inspection before sale. *City of St. Louis v. Shands*, 149.

STOCK.

See CORPORATIONS, 3

SUMMONS.

See VARIANCE.

SUNDAY.

1. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State v. Amba*, 214.
2. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
3. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*
4. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully and negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs v. Miller*, 391.

SUBPCENA DUCES TECUM.

See NOTARY PUBLIC.

SUPREME COURT.

See RULES OF, 605.

1. Judgment reversed for an insufficient finding of the facts. *State v. Ruggles*, 99. *Javens v. Harris*, 262.
2. Judgment reversed for want of any finding of the facts. *Davidson v. Rozter*, 132. *Jamison v. Hughes*, 133. *Whyte v. Bennett's Administrator*, 262.
3. Where a cause is tried by a court without a jury, the supreme court will affirm if the facts found support the judgment, without regard to the instructions given or refused. *Robinson v. Rice*, 229.
4. The supreme court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are only referred to in the record by line and page of the original. *Ib.*
5. Bill for a divorce. It appeared from the record that, after a decree

SUPREME COURT—(Continued.)

- nist, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver v. Oliver*, 261.
6. Judgment affirmed for want of bill of exceptions, the cause having originated before a justice, and nothing appearing in the record to warrant a disturbance of the judgment. *Elliott v. Pogue*, 263.
 7. Bill of exceptions stricken out, because not filed at the term at which the trial took place, no reason for the delay appearing on the record. *Ruble v. Thomasson*, 263.
 8. The supreme court will not reverse a judgment for excessive damages unless in a very clear case. *Woodson v. Scott*, 272.
 9. Trial by a court of an appeal from a justice, and no question of law saved. Judgment affirmed. *Aiken v. Todd*, 276.
 10. The supreme court will not reverse a case because the plaintiff did not swear anew to his petition after an amendment in the caption. *Matthews v. Rountree*, 282.
 11. The supreme court will not reverse because the inferior court refused time to answer after the overruling of a motion to dismiss for frivolous reasons. *Ib.*
 12. Judgment affirmed because no question of law was ruled below against the appellant. *Garner v. Beauchamp*, 318.
 13. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff, the recovery being limited to the damages for the mere taking of the timber. *Pearson v. Inlow*, 322.
 14. The supreme court will not disturb a non-suit voluntarily taken by a plaintiff, upon the overruling of a motion to strike out a part of the defendant's answer. (*Schulter v. Bockwinkle*, 19 Mo. Rep. 647, affirmed.) *Dumey v. Schoeffler*, 323.
 15. Where a cause appealed from a justice of the peace is tried in the circuit court upon an agreed statement of facts, the supreme court will reverse unless the facts support the judgment, although no instructions are asked. *Stone v. Corbett*, 350.
 16. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Hull v. Dowdall*, 359.
 17. The supreme court will not refuse to set aside a nonsuit taken upon the rejection of material evidence necessary to the plaintiff's recovery, because the record does not show that the plaintiff was prepared with proof upon the other material facts of the case, or because the evidence may possibly have been rejected for the reason that it was offered out of the order of time prescribed by the court trying the cause. *Dowd v. Winters*, 361.

SUPREME COURT—(Continued.)

18. The supreme court will not revise the discretion exercised by inferior courts in allowing amendments, unless it clearly appears that the discretion has been abused to the prejudice of the party. *Cullum v. Cundiff*, 522.
19. A case where the supreme court refused to reverse a judgment for excessive damages. *Barth v. Merritt*, 567.
20. Where a bill in chancery, to which limitation was set up as a bar, contained no allegation of any exempting disability, but it appeared in evidence that some of the complainants had been under a disability which prevented a bar, though the others had not, the supreme court reversed a decree dismissing the bill, in order to afford an opportunity to amend, so as to save the rights of those who were not barred. *Keeton v. Keeton*, 530.
21. It has been repeatedly held that the practice act of 1849, (except the 25th article,) does not apply to the trial in the appellate court of a cause appealed from a justice of the peace; but the old practice must still be observed. No finding of facts is necessary. Declarations of law must be asked, and the material evidence preserved in a bill of exceptions; otherwise, the case will not be reviewed in the supreme court. *Clohecy v. Ragan*, 453.

SURVEYOR GENERAL.

1. A surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed v. Conway*, 22.

TAXES.

1. The illegal exemption by city ordinance of the property of one tax payer from assessment for a special sewer tax, will not authorize an injunction to restrain the city from collecting the assessment against another tax payer, not exceeding the amount which the city was authorized to impose; certainly not, unless it appears that, upon payment of the assessment sought to be enjoined, the plaintiff will have paid more than would have been his proportion had it not been for the exemption. *Page v. City of St. Louis*, 136.
2. A party cannot maintain an action to recover back from a city illegal taxes paid by him without objection. (*Walker v. City of St. Louis*, 15 Mo. Rep. 563, affirmed.) *Christy's Adm'r v. City of St. Louis*, 143.
3. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r v. City of St. Louis*, 143.
4. The same principle applies to an administrator who voluntarily pays illegal taxes upon the estate of his intestate, as to a person acting for himself. Neither can maintain an action to recover back. *Id.*

TAXES—(Continued.)

5. Nor can an administrator recover back illegal taxes paid without objection to a former administrator. *Ib.*

TELEGRAPHIC DISPATCH.

See EVIDENCE, 11, 13. AGREEMENT, 13, 15.

TIME.

See LIMITATIONS.

1. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Thompson v. Lyon*, 155.
2. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Bollinger v. Chouteau*, 89.

TRESPASS.

1. An injunction does not lie to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James v. Dixon*, 79.
2. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing a slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert v. Rider & Allen*, 146.
3. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
4. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff, the recovery being limited to the damages for the mere taking of the timber. *Pearson v. Inlow*, 322.

TRUSTS AND TRUSTEES.

See USES AND TRUSTS.

USES AND TRUSTS.

See LANDS AND LAND TITLES, 2. FRAUDULENT CONVEYANCES, 2.

1. An infant cannot execute a power of appointment coupled with an interest. *Thompson & Wife v. Lyon*, 155.
2. The disability of infancy cannot be dispensed with by the instrument creating the power. *Ib.*
3. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering.

USES AND TRUSTS—(Continued.)

- ing to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Ib.*
4. A court of equity, however, will not, in such a case, interfere against a purchaser for a valuable consideration without notice. *Ib.*
 5. A conveyance by a trustee passes the *legal title*, although he may be guilty of a breach of trust. *Gale v. Mensing*, 461.
 6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Ib.*
 7. G. in Kentucky, in 1829, executed a deed for slaves to trustees, to be held, with their increase, *for the benefit of G. and wife during their lives*, and after their deaths to be divided among their children. This deed was acknowledged and recorded. The certificate of acknowledgment ran in the name of J. B., clerk of the county court, but was signed at the foot "J. B., by J. J. A., deputy clerk." G. remained in possession of the slaves, and shortly afterwards removed with them to Missouri, where he sold two of them to the defendant, who had notice of the deed, and the surviving trustee joined in the bill of sale. In a suit brought by the children of G., after the death of himself and wife, to recover the two slaves thus sold and their increase, *Held*, that the deed was not void upon its own face under the laws of Kentucky in force when it was executed, and that the acknowledgment was sufficient; that the legal title not being in the plaintiffs, the suit was not properly brought; that it should have been in the name of the trustees, or if they were dead, or refused to accept the trust, the petition should have been framed for the appointment of trustees, or for the execution of the trust without their intervention. *Gibbons v. Gentry*, 468.
 8. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton v. Keeton*, 530.

VENDOR AND VENDEE.

See SALE.

VARIANCE.

1. A defendant after appearance cannot take advantage of a variance between the petition and the summons in the names of the plaintiffs. *Hite v. Hunton*, 286.
2. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler v. Servoss*, 6 Mo. Rep. 24, affirmed.) *Dowd v. Winters*, 361.

VENDOR AND PURCHASER.

See SALE.

1. Smallness of consideration in a sheriff's deed, of itself, under the cir-

VENDOR AND PURCHASER—(*Continued.*)

- cumstances of the case, *held* not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau v. Nuckolls*, 442.
2. It being important to know whether a purchaser for value of real estate had notice of fraud vitiating the title of his vendor, the court trying the case without a jury must explicitly find upon this point. *Ib.*
 3. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf v. Robinson*, 459.
 4. The title of the purchaser at an administration sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Ib.*
 5. A court of equity will not interfere against a purchaser for a valuable consideration without notice from the trustee of an infant beneficiary under the latter's exercise of a power of appointment. *Thompson v. Lyon*, 155.
 6. A husband in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Robinson v. Rice*, 229.
 7. The title of the purchaser at an administrator sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Wolf v. Robinson*, 459.

VENUE.

1. A second change of venue may be granted where the judge has been counsel in the cause, notwithstanding the twenty-eighth section of article five of the act concerning practice and proceedings in criminal cases. (R. C. 1845.) *State v. Gates*, 400.
2. "The county aforesaid" in an indictment not a sufficient venue, where two counties have been previously named. *State v. McCracken*, 411.
3. A judgment rendered in a court of one county, in a cause taken by a second change of venue by consent of parties from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau v. Nuckolls*, 442.

VERDICT.

7. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *State v. Upton*, 397.
8. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *Ib.*

WARRANTY.

1. Where a vendor is in possession of personal property, and sells for full value, a warranty of title is implied. *Robinson v. Rice*, 229.

WILL.

1. A court will not interfere to establish the validity of a charity in a will, depending upon a contingency which has not arisen and may never arise. *The State v. Prewett*, 165.
2. A will described land devised as the "south-east and south-west quarters of section 4, in township 60, range 38, in Holt county, Missouri." The devisee of the south-west quarter was to have access to the "Big Spring." *Held*, parol evidence that the corresponding quarter sections of township *fifty-nine*, in the same range and county, were intended to be devised, was admissible, it appearing that the "Big Spring" was upon the south-east quarter of section 4, in township *fifty-nine*, and that the testator never owned or claimed any land in section 4 of township 60. *Riggs v. Myers*, 239.
3. If a testator's name is signed to a will by another at his request, and he then makes his mark, this is not a sufficient signing by the testator himself, but the will must be attested as required by the fifth section of the act concerning wills, (R. C. 1845.) *Northcutt v. Northcutt*, 266.
4. A will contained this clause: "I wish all my money placed out on interest, on undoubted security, so that the interest may support my children not of age, until they become of age or marry." *Held*, upon the marriage of one of the daughters, she became immediately entitled to her distributive share, although other children were not of age or married. *Overton v. Davy's Executor*, 273.
5. Where a will is impeached for undue influence exercised over the weak intellect of the testator, the inquiry is, not merely whether an undue influence was exerted at the time of the execution of the will, but whether an undue influence had been acquired, and operated upon the testator in the disposition of his property. *Taylor v. Wilburn*, 306.

WITNESS.

See EVIDENCE. JURORS, 1, 2.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*. *Ex parte Mallinkrodt*, 493.

WRIT OF ERROR.

See APPEAL.

1. Under the charter of the Hannibal and St. Joseph railroad company, (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal and St. Joseph Railroad Co. v. Morton*, 70.
2. A writ of error does not lie to the order of a county court removing a county seat. *Johnson v. Clark County Court*, 529.
3. The pendency of a writ of error in the supreme court of the United States does not affect the duration of the lien of a judgment of the circuit court. *Chouteau v. Nuckolls*, 442.